Supreme Court, U.S.
FILED
JUN 4 1990
JOSEPH F. SPANIOL, JR.
CLERK

89-1888

No. (1)

IN THE

Supreme Court of the United States

October Term, 1989

CITY OF SOUTH EUCLID,
Petitioner,

vs.

DAIVA RICHARDSON and RONNIE RICHARDSON,
Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

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QUESTIONS PRESENTED

I. Did this Court's Decision in *Kolender v. Lawson*, 461 U.S. 352 (1983) Modify the Long-Standing Rule that a Statute or Ordinance Can Be Struck Down as Vague On Its Face Only If It Is Impermissibly Vague "In All Of Its Applications?"

II. Can Legislation Be Invalidated On Overbreadth Grounds Where the Court Does Not Consider Whether the Supposed Threat to First Amendment Interests is "Real and Substantial?"

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Respondents.

PETITION FOR WRIT OF CERTIORARI
To the Supreme Court of Ohio

Petitioner City of South Euclid prays that a writ of certiorari issue to review the judgment of the Supreme Court of Ohio entered in these proceedings on March 7, 1990.

OPINIONS BELOW

The opinion of the Supreme Court of Ohio is reported at 49 Ohio St. 3d 147, 551 N.E.2d 606 (1990), and it appears in Appendix A at A1 to A16.

The opinion of the Ohio Court of Appeals is unreported and is reproduced in Appendix B at A17 to A27.

The opinion of the South Euclid Municipal Court is unreported and is reproduced in Appendix C at A28 to A48.

JURISDICTION

The judgment of the Supreme Court of Ohio striking down South Euclid Codified Ordinance 36-86 as unconstitutionally vague and overbroad was entered on March 7, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

UNITED STATES CONSTITUTION, AMENDMENT I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; . . . .

UNITED STATES CONSTITUTION, AMENDMENT XIV, SECTION 1

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

SOUTH EUCLID CODIFIED ORDINANCE 36-86

666.07 BROTHEL; PATRONIZING; PROCURING; PROSTITUTION.

(c) NO PERSON, ORGANIZATION CLUB OR ASSOCIATION SHALL OWN, OPERATE, MAINTAIN OR MANAGE A BROTHEL OR SOLICIT, INVITE OR ENTICE ANOTHER TO PATRONIZE A BROTHEL OR TO ENGAGE IN ACTS OF LEWDNESS OR SEXUAL CONDUCT AS HEREIN DEFINED.

666.01 DEFINITIONS.

(l) "Brothel" means any place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purposes of engaging in group sex, sexual conduct and sexual acts, as herein defined, lewdness or acts of gross and wanton indecency in sexual relations or other sexual activity which corrupts or tends to corrupt the morals of persons in the community.

(m) "Lewdness" means sexual conduct or relations of such gross indecency and so notorious as to corrupt community morals.

STATEMENT OF THE CASE

This case presents important constitutional questions concerning the scope and applications of the vagueness and overbreadth doctrines under the Due Process Clause. On the basis of those doctrines, a sharply divided Supreme Court of Ohio invalidated a codified ordinance of the City of South Euclid and, in doing so, dramatically departed from the guidelines set by this Court and others for dealing with vagueness and overbreadth challenges to criminal legislation. The precedent established by the majority in the Supreme Court of Ohio in this case is such a dramatic departure from this Court's jurisprudence that, if followed in future cases, it could threaten to invalidate many statutes and ordinances in Ohio. Intervention by this Court is necessary to address the scope and application of the vagueness and overbreadth doctrines.

This appeal arises out of criminal charges brought on December 30, 1986 by Appellant City of South Euclid against Respondents Ronnie Richardson and Daiva Richardson, residents of that City, under South Euclid Codified Ordinance 36-86.[1] Codified Ordinance 36-86 bars ownership or operation of a "Brothel" within the City of South Euclid, and the term brothel is expressly defined as follows:

> "Brothel" means any place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purposes of engaging in group sex, sexual conduct and sexual acts, as herein defined, lewdness or acts of gross or

[1] The cases against Respondents involve identical issues and were consolidated for decision by each of the lower courts. In this Petition, the cases against Respondents are consolidated for decision pursuant to Rule 12.2 of the Rules of the United States Supreme Court.

> wanton indecency in sexual relations or other sexual activity which corrupts or tends to corrupt the morals of persons in the community.[2]

Prior to trial, Respondents moved the South Euclid Municipal Court to dismiss the criminal charges against them on the grounds that Ordinance 36-86 is unconstitutionally vague, overbroad and violates Respondents' constitutional right of privacy.[3] Because these motions to dismiss were brought prior to trial, the Municipal Court did not have an evidentiary record against which the constitutional challenges to Ordinance 36-86 could be considered. Had a trial been allowed to proceed, the evidence would have shown that Respondents were operating a facility for group sex by utilizing their South Euclid residence for regularly-scheduled group sex parties, charging participants $25 per couple to attend.

On June 26, 1987, the Municipal Court granted Respondents' motions and dismissed the criminal charges based on the court's finding that Ordinance 36-86 is unconstitutionally vague and overbroad. *See* App. C at A45 to A48. The principles relied on by the Municipal Court in reaching that conclusion are in conflict with decisions of other courts concerning the scope and application of the vagueness and overbreadth doctrines.

With respect to vagueness, the Municipal Court did not follow the long-standing rule that an ordinance should be upheld against a facial challenge unless it is vague "in all of its applications." Instead, the Municipal

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[2] A copy of South Euclid Ordinance 36-86 appears in Appendix D herein at A49 to A50.

[3] Respondents sought dismissal on several other grounds, none of which are relevant to this appeal.

Court struck down Ordinance 36-86 because the court found that "parts of Ordinance 36-86 are unconstitutional." *See* App. C at A48. This constituted a significant departure from the standards applied by other courts in dealing with vagueness challenges.

The standard applied by the Municipal Court for dealing with the overbreadth challenge was likewise a dramatic departure from principles followed by other courts. Instead of considering whether the alleged threat to constitutionally-protected conduct was "real" and "substantial," the Municipal Court was willing to invalidate the Ordinance based on a hypothetical and insubstantial threat to constitutionally protected activity. *See* App. C at A40 to A48.

The City of South Euclid filed a timely appeal with the Ohio Court of Appeals for the Eighth Appellate District. On August 29, 1988, the Court of Appeals affirmed the Municipal Court's finding that Ordinance 36-86 is unconstitutionally vague and overbroad. *See* App. B at A23 to A26. Like the Municipal Court, the Ohio Court of Appeals reached its conclusion by applying vagueness and overbreadth tests which are in conflict with decisions in other courts.

As to vagueness, the Ohio Court of Appeals struck down Ordinance 36-86 as vague on its face even though the court conceded that "[m]en of 'reasonable intelligence' may understand the meaning of the term 'group sex,' " (*see* App. B at A25) and, therefore, the court did not find that the ordinance is not vague in all of its applications. This result created a conflict with courts in other jurisdictions which have rejected facial vagueness challenges where legislation is not vague "in all of its applications."

Likewise, in concluding that Ordinance 36-86 was unconstitutionally overbroad, the Court of Appeals struck down the ordinance based solely on a supposed threat that the ordinance could be used to regulate private sexual relations between a husband and wife. *See* App. B at A25. However, the court acknowledged that the ordinance was not intended to regulate such activities. *See* App. B at A25. Moreover, the court did not consider, as it must, whether the alleged infringement on First Amendment rights was "real" and "substantial." This too created a conflict with other courts concerning the proper test to apply in an overbreadth challenge.

The City of South Euclid filed a timely appeal in the Supreme Court of Ohio. There, in a sharply divided 4-3 decision, the Ohio Supreme Court affirmed the decisions of the lower courts invalidating Ordinance 36-86 on vagueness and overbreadth grounds. The majority opinion simply adopted verbatim the decision of the Ohio Court of Appeals. *See* App. A at A3.

Although the majority in the Supreme Court of Ohio did not expressly rely upon or cite this Court's decision in *Kolender v. Lawson*, 461 U.S. 352 (1983), it adopted the conclusion of the Court of Appeals that the Ordinance was vague on its face even though the Ordinance's proscriptions against "group sex" were found not to be vague and, accordingly, the Ordinance is not vague in all of its applications. *See* App. A at A10. Respondents strenuously argued in the Supreme Court of Ohio that footnote 8 in *Kolender* compelled the conclusion that the ordinance could be invalidated even if it were not vague in all its

applications.[4] The decision of the Court of Appeals was adopted by the Supreme Court of Ohio, albeit without specific reference to *Kolender*.[5]

A strongly-worded dissent by three members of the Ohio Supreme Court concluded that Ordinance 36-86 is not vague or overbroad "[i]n light of [the] well-established principles of analysis pertaining to vagueness and overbreadth." *See* App. A at A12. As to vagueness, the dissent concluded that Ordinance 36-86 is set out in terms which are sufficiently precise to put the average person on notice of what conduct is prohibited. *See* App. A at A13. The dissent thought it "disingenuous" to suggest that a reasonable person would not understand terms in the ordinance such as "group sex", "sexual conduct" and "sexual activities"; it "strains credulity", according to the dissent, "to suggest that [Respondents] could not have known the nature of the sex acts proscribed by the ordinance." *See* App. A at A12 to A13. Moreover, the dissent said it is "beside the point" that Ordinance 36-86 may be ambiguous at its periphery; it is enough that Respondents were on notice that their group sex activities were proscribed. *See* App. A at A14. On that basis, the dissent took issue with the majority's willingness to invalidate the Ordinance as vague on its face merely because it might be unclear at its periphery, citing this Court's decision in *Broadrick v. Oklahoma*, 413 U.S. 601 (1973). *See* App. A at A13.

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[4] Brief of Respondents at 19, quoted *infra* at pp. 15-16, n.7.

[5] This Court's recent decision in *Osborne v. Ohio*, _____ U.S. _____, 109 L. Ed. 2d 98 (1990), did not address the issue presented in this case concerning the impact of *Kolender* on a facial vagueness challenge. In *Osborne*, the Court accepted a limiting construction to an Ohio statute in concluding that the statute was not unconstitutionally overbroad. The Court did not consider whether legislation can be challenged as being vague on its face even though it is not vague in all of its applications.

As to overbreadth, the dissent disagreed with the majority's willingness to invalidate the Ordinance based on the supposed threat that it could be used to regulate private sexual relations between husband and wife. According to the dissent, the plain language of Ordinance 36-86 demonstrates that it prohibits "constitutionally unprotected activities [such] as group sex and sexual conduct among persons who are not married to each other, activities associated with the operation of a brothel." *See* App. A at A15. On that basis, the dissent determined that the alleged overbreadth was not "real" and "substantial" when considered in light of the "plainly legitimate sweep" of the Ordinance and the "great unlikelihood" that it would be used to regulate private sexual relations between husband and wife. *See* App. A at A15. Accordingly, the dissent concluded that Ordinance 36-86 was not overbroad on its face.

REASONS FOR GRANTING THE WRIT

This case warrants this Court's immediate review because it presents a needed opportunity to resolve a conflict which has arisen concerning the impact of this Court's decision in *Kolender v. Lawson*, 461 U.S. 352 (1983) on a facial vagueness challenge, and a conflict between the Supreme Court of Ohio and other courts concerning the proper test to apply in an overbreadth challenge.

I. Did this Court's Decision in *Kolender v. Lawson*, 461 U.S. 352 (1983), Modify the Long-Standing Rule that a Statute or Ordinance Can Be Struck Down as Vague On Its Face Only If It Is Impermissibly Vague "In All Of Its Applications?"

Prior to *Kolender v. Lawson*, 461 U.S. 352 (1983), this Court followed the rule that a statute or ordinance can be struck down as vague on its face only if it is vague "in all of its applications." The correlative rule is that a defendant whose own conduct is clearly proscribed has no standing to challenge the statute or ordinance as vague.

These principles were reaffirmed, for example, in *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489 (1982), where a facial vagueness and overbreadth challenge to a drug paraphernalia ordinance was addressed. In upholding the ordinance, this Court reaffirmed the traditional vagueness rules:

> In a facial challenge to the overbreadth and vagueness of a law, a court's first task is to determine whether the enactment reaches a substantial amount of constitutionally protected conduct. If it does not, then the overbreadth challenge must fail. The court should then examine

> the facial vagueness challenge and, assuming the enactment implicates no constitutionally protected conduct, should uphold the challenge only if the enactment is impermissibly vague in all of its applications. A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law.

Hoffman Estates, 455 U.S. at 494; *see Broadrick v. Oklahoma*, 413 U.S. 601, 610 (1973) ("Embedded in the traditional rules governing constitutional adjudication is the principle that a person to whom a statute may constitutionally be applied will not be heard to challenge that statute on the ground that it may conceivably be applied unconstitutionally to others, in other situations not before the Court."); *Parker v. Levy*, 417 U.S. 733, 756 (1974) ("One to whose conduct a statute clearly applies may not successfully challenge it for vagueness.")

The decision in *Kolender v. Lawson*, 461 U.S. 352 (1983) has raised questions in lower courts about the proper test to apply in a facial vagueness challenge. In *Kolender*, this Court invalidated a California loitering statute as vague on its face because it "vest[ed] virtually complete discretion in the hands of the police to determine whether the suspect has satisfied the statute," thereby providing "*no* standard for determining what a suspect has to do in order to satisfy the [statute's] requirement[s]." *Id.*, 461 U.S. at 358 (emphasis added).[6]

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[6] The statute in *Kolender* required that an individual provide a "credible and reliable" identification when requested to do so by a police officer who has a reasonable suspicion (but not probable cause) to believe that criminal activity has occurred.

The majority and dissent in *Kolender* appeared to disagree on the proper test to apply in a facial vagueness challenge. In his dissent, Mr. Justice White argued that "whether or not a statute purports to regulate constitutionally protected conduct, it should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." *Id.*, 461 U.S. at 370. In a footnote, the *Kolender* majority stated that a statute which threatens constitutionally protected activity can be invalidated as vague on its face even if it has some valid application. *Id.*, 461 U.S. at 359 n.8.

Kolender has spawned confusion in lower courts about the proper test to be applied in a facial vagueness challenge. The Ninth Circuit addressed this controversy in *Schwartzmiller v. Gardner*, 752 F.2d 1341 (9th Cir. 1984), where the court concluded that, despite *Kolender*, the traditional vagueness rules survive:

> Until the Supreme Court provides further guidance, it appears that *Kolender* presented a unique fact situation and that facial vagueness review may still be appropriate only when the "enactment is impermissibly vague in all of its applications." *Flipside*, 455 U.S. at 495, 102 S. Ct. at 1191. If *Kolender* expands the availability of facial vagueness review, however, it does so only if the challenger at least demonstrates implication of "a substantial amount of constitutionally protected conduct."

Schwartzmiller, 752 F.2d at 1348 (quoting *Flipside* at 495); *see United States v. Austin*, 1990 U.S. App. Lexis 6788 (9th Cir. May 2, 1990).

Like *Schwartzmiller*, most courts in other jurisdictions also continue to apply the rule that a statute or ordinance can be struck down on its face only if it is vague in all of its applications, and the correlative rule that a party whose conduct fits squarely within the

unambiguous proscriptions of a statute or ordinance may not successfully challenge it as vague on its face. *Ferguson v. Estelle*, 718 F.2d 730, 734-735 (5th Cir. 1983); *Gallaher v. City of Huntington*, 759 F.2d 1155, 1160 (4th Cir. 1985); *United States v. Thomas*, 864 F.2d 188, 194 (D.C. Cir. 1988); *Blackwelder v. Safnauer*, 689 F. Supp. 106, 126 (N.D.N.Y. 1988), *appeal dismissed*, 866 F.2d 548 (2d Cir. 1989); *accord United States v. Perceval*, 803 F.2d 601, 604 (10th Cir. 1986).

By contrast, the Supreme Court of Ohio in this case invalidated Ordinance 36-86 on facial vagueness grounds even though the Court did not find that the ordinance is vague "in all of its applications." Ordinance 36-86 prohibits the use of a residence for the purpose of engaging in group sex. The conduct giving rise to the charges against Respondents consisted of group sex activities. Because the ordinance is not vague in its application to group sex activities, Appellant City of South Euclid argued in the Ohio Supreme Court that the ordinance should be upheld in a facial vagueness challenge since the ordinance is not vague "in all of its applications." Respondents disagreed, arguing that this Court's decision in *Kolender* specifically rejected the "vague in all of its applications" test in a facial vagueness challenge.[7] Accordingly, Respondents argued that it was appropriate to strike down Ordinance 36-86 as facially vague even if the ordinance has some valid application.

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[7] As set forth at p. 19 in Respondents' Brief in the Ohio Supreme Court:

> [T]he precise argument put forth by the City here—that an ordinance or statute *must* be viewed in light of the defendant's conduct, and can only be declared unconstitutionally vague and

(Footnote continued on following page.)

The Ohio Supreme Court concluded that Ordinance 36-86 is vague on its face despite the court's concession that "men of 'reasonable intelligence' may understand the meaning of 'group sex' " (*see* App. A at A10) and, therefore, the ordinance is not vague in all of its applications. The court invalidated the ordinance because certain of its other terms, unrelated to Respondents' activites, were found to be vague. *See* App. A at A11 to A12. By striking down an ordinance because of vagueness at its periphery, the Supreme Court of Ohio has drastically expanded the standing of a party to raise facial vagueness challenges and, consequently, has departed dramatically from the traditional vagueness rules.

So too have other courts departed from the traditional vagueness rules in reliance on *Kolender*. For example, in a facial vagueness challenge, the Seventh Circuit will invalidate a statute or ordinance where it "is unconstitutionally vague in at least a substantial number of the cases to which it could apply." *United States v. Rodgers*, 755 F.2d 533, 543-544 (7th Cir.), *cert. denied*, 473 U.S. 907 (1985) (citing *Kolender*). Likewise, where legislation infringes on constitutionally protected activities, the Eighth Circuit has said that it will uphold a facial vagueness challenge even though the legislation is not vague in its application to the challenger. *Garner v. White*, 726 F.2d 1274, 1277 n.2 (8th Cir. 1984) (citing *Kolender*).

(Footnote continued from preceding page.)

overbroad if it is unconstitutional in *all* of its applications—was specifically rejected by the United States Supreme Court in *Kolender, supra*. There, the Supreme Court declared a statute unconstitutional on its face, rejecting the dissent's position that "a criminal statute must be judged in light of the conduct that is charged to be violative of the statute," and "should not be held unconstitutionally vague on its face unless it is vague in all of its possible applications." 461 U.S. at 369-70 (White, *J.*, dissenting).

Immediate intervention by this Court is necessary to resolve the confusion concerning the proper test to be applied in a facial vagueness challenge. Moreover, if the Ohio Supreme Court's decision in this case is allowed to stand as precedent, it could have disturbing and far-reaching implications. To begin with, the Supreme Court of Ohio has now dramatically expanded the standing of a party to challenge legislation on vagueness grounds. It now appears in the Ohio Supreme Court that a party who has adequate notice that his or her conduct is proscribed has standing to challenge the statute or ordinance as vague because it might be ambiguous at its periphery. No doubt many statutes and ordinances in Ohio can be attacked as ambiguous at their periphery, and such legislation is at risk of invalidation under the facial vagueness test applied by the Ohio Supreme Court. In addition, the decision in this case could, ironically, have the effect of encouraging illegal activity; individuals who are on notice that their activities are unlawful would be permitted to engage in illegal activity without fear of prosecution so long as they could later prove that other portions of the statute or ordinance, unrelated to their conduct, are vague.

This Court should grant certiorari to resolve the confusion concerning the proper test to apply in a facial vagueness challenge.

II. Can Legislation Be Invalidated on Overbreadth Grounds Where the Court Does Not Consider Whether the Supposed Threat to First Amendment Interests is "Real" and "Substantial?"

It is well established, in a long line of decisions from this Court, that a statute or ordinance may be invalidated as overbroad on its face only where the alleged overbreadth is "not only . . . *real*, but *substantial* as well, judged in relation to the statute [or ordinance's] plainly legitimate scope." *Broadrick v. Oklahoma*, 413 U.S. 601, 610-618 (1973) (emphasis added); *Young v. American Mini Theaters, Inc.*, 427 U.S. 50, 59-60 (1976); *City of New York v. Ferber*, 458 U.S. 747, 770 (1982); *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984); *New York State Club Ass'n v. City of New York*, 108 S. Ct. 2225, 2233 (1988).

"The requirement of 'substantial overbreadth' is directly derived from the purpose and nature of the doctrine. While a sweeping statute, or one incapable of limitation, has the potential to repeatedly chill the exercise of expressive activity by many individuals, the extent of deterrence of protected speech can be expected to decrease with the declining reach of the regulation." *City of New York v. Ferber*, 458 U.S. at 772.

Importantly, this Court has also recognized that application of the overbreadth doctrine *without the substantiality requirement* would result in the invalidation of virtually every piece of legislation:

> Without a substantial overbreadth limitation, review for overbreadth would be draconian indeed. It is difficult to think of a law that is utterly devoid of potential for unconstitutionality in some conceivable application.

Ferber, 458 U.S. at 772 n.27 (citation omitted).

Despite this Court's clear instructions, the Supreme Court of Ohio in this case simply ignored the guidelines set by this Court for dealing with overbreadth challenges. In striking down Ordinance 36-86 as unconstitutionally overbroad, the Ohio Supreme Court could hypothesize as to only one instance of supposed overbreadth—the possibility that Ordinance 36-86 could be construed to regulate constitutionally protected private sexual relations between husband and wife. *See* App. A at A11. But importantly, the Court also recognized that Ordinance 36-86 was not intended to regulate such activities. *See* App. A at A11. This by itself should have been enough to reject the overbreadth challenge since any supposed threat to First Amendment interests is unrealistic.

Nonetheless, the Ohio Supreme Court did strike down Ordinance 36-86 as unconstitutionally overbroad. In doing so, the majority in the Ohio Supreme Court made no attempt, as it must, to assess whether the alleged threat to constitutionally protected conduct was "substantial" when judged in relation to the plainly legitimate scope of Ordinance 36-86. The court did not even acknowledge that it was required to find "substantial overbreadth." Instead, the majority apparently concluded that it was enough to invalidate an ordinance as overbroad merely by finding one instance of a supposed threat to constitutionally protected conduct.

On the other hand, the dissenters in the Ohio Supreme Court strongly disagreed that Ordinance 36-86 was unconstitutionally overbroad. Unlike the majority, the dissent relied on the "well-established principles of analysis pertaining to . . . overbreadth." *See* App. A at A12. The dissent recognized, relying on *Broadrick v.*

Oklahoma and its progeny, that Ordinance 36-86 should be invalidated only if its overbreadth is "not only . . . real, but substantial as well, judged in relation to the [ordinance's] plainly legitimate sweep." *See* App. A at A15. Moreover, citing this Court's decision in *Ferber*, the dissent noted that Ordinance 36-86 should be invalidated as overbroad only if "it reaches a substantial number of impermissible applications." *See* App. A at A15.

On the basis of these well-established principles (not even mentioned by the majority opinion), the dissent concluded that Ordinance 36-86 is not unconstitutionally overbroad. The dissent found that the "plainly legitimate sweep" of Ordinance 36-86 is the prohibition of "such constitutionally unprotected activities as group sex and sexual conduct among persons who are not married to each other, activities associated with the operation of a brothel." *See* App. A at A15. On the other hand, the dissent noted that the majority could put forth only one instance of alleged overbreadth—the supposed threat to private sexual relations between husband and wife. That threat was viewed as unrealistic and insubstantial, according to the dissent, "given the legitimate purpose of the ordinance and the great unlikelihood of such an application." *See* App. A at A15. On that basis, the dissent concluded that Ordinance 36-86 was not unconstitutionally overbroad.[8]

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[8] Respondent also argued below that the solicitation prohibitions in Ordinance 36-86 infringed on First Amendment interests. Even the lower courts refused to accept this argument, and with good reason. *See District of Columbia v. Garcia*, 335 A.2d 217 (D.C. Ct. App.) (Solicitation to engage in unlawful act does not infringe on constitutionally protected speech), *cert. denied*, 423 U.S. 894 (1975).

By ignoring the guidelines set by this Court for dealing with overbreadth challenges, the majority in the Supreme Court of Ohio not only reached an erroneous result in this case, but more importantly, established dangerous precedent in Ohio for dealing with overbreadth challenges. It now appears in the Supreme Court of Ohio that a party challenging legislation as overbroad no longer needs to demonstrate "substantial overbreadth." The impact on future cases could not be clearer. Application of the overbreadth doctrine without a "substantiality" requirement threatens to invalidate every piece of Ohio legislation, as this Court itself recognized in *Ferber*.

This Court should grant certiorari to reaffirm the substantial overbreadth test and correct the error committed by the Supreme Court of Ohio.

CONCLUSION

This case presents important constitutional questions concerning the scope and application of the vagueness and overbreadth doctrines. The ruling as to vagueness deepens a conflict which has arisen following this Court's decision in *Kolender*, and the ruling as to overbreadth creates a conflict with other courts concerning the necessity of finding "substantial" overbreadth. The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Decision of the Supreme Court of Ohio

(Decided March 7, 1990)

No. 88-1885

THE SUPREME COURT OF OHIO

COLUMBUS

CITY OF SOUTH EUCLID,
Appellant,

vs.

DAIVA RICHARDSON and RONNIE RICHARDSON,
Appellees.

[Cite as *South Euclid v. Richardson* (1990), 49 Ohio St. 3d 147.]

*Constitutional law—Criminal law—Municipal ordinance defining "brothel" as "any place, house or dwelling maintained and/or operated by any person *** for the purposes of engaging in group sex, sexual conduct and sexual acts" held to be*

unconstitutionally void for vagueness and overbroad by the court of appeals—Judgment of court of appeals will be affirmed, when.

(No. 88-1885—Submitted November 22, 1989—Decided March 7, 1990.)

APPEALS from the Court of Appeals for Cuyahoga County, Nos. 54247 and 54248.

[148] *Jones, Day, Reavis & Pogue, Dennis M. Kelly* and *Albert J. Lucas, Victor E. DeMarco,* law director, and *Robert P. DeMarco,* for appellant.

Berkman, Gordon, Murray & Palda, J. Michael Murray and *Ann N. Butenhof,* for appellees.

Lois Robinson, urging affirmance for *amicus curiae,* American Civil Liberties Union of Cleveland Foundation, Inc.

Per Curiam. On October 14, 1986, the Council of the city of South Euclid passed Ordinance No. 36-86. The ordinance makes it a first degree misdemeanor for any person to own, operate, maintain or manage a brothel and defines "brothel," in relevant part, as follows:

"*** any place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purposes of engaging in group sex, sexual conduct and sexual acts, as herein defined, lewdness or acts of gross and wanton indecency in sexual relations or other sexual activity which corrupts or tends to corrupt the morals of persons in the community."

On December 30, 1986, each of the defendants was charged with violating Ordinance No. 36-86, as set forth in the Codified Ordinances of the city of South Euclid. Upon motions to dismiss in the South Euclid Municipal Court, the court dismissed the charges against both

defendants, holding that the term "brothel" as defined in the ordinance makes the ordinance void for vagueness and overbroad. The court of appeals affirmed.

We adopt the August 29, 1988 decision of the court of appeals, which decision is attached as an Appendix to this entry, and affirm the decision of the court of appeals for the reasons stated therein.

Judgment affirmed.

MOYER, *C.J.*, SWEENEY, HOLMES and H. BROWN, *JJ.*, concur.

DOUGLAS, WRIGHT and RESNICK, *JJ.*, dissent.

APPENDIX

DAVID T. MATIA, *P.J.*

In case No. 54247, plaintiff-appellant, the city of South Euclid, appeals from the South Euclid Municipal Court's dismissal of plaintiff-appellant's criminal complaint against defendant-appellee Daiva Richardson. In case No. 54248, plaintiff-appellant, the city of South Euclid, appeals from the South Euclid Municipal Court's dismissal of plaintiff-appellant's criminal complaint against defendant-appellee Ronnie Richardson.

Pursuant to this court's order of August 28, 1987, in response to South Euclid's motion to consolidate appeals, and in accordance with App. R. 3(B) and Eighth District Court of Appeals Local Rule 3(B)(3), case No. 54247, *South Euclid v. Daiva Richardson*, and case No. 54248, *South Euclid v. Ronnie Richardson*, were consolidated for appeal and are therefore discussed and decided together.

On October 14, 1986, the South Euclid City Council, by a vote of 6-0, passed South Euclid City Ordinance No. 36-86, designating it an emergency ordinance:

"*Section 1.* That Section 666.01 Definitions, as contained in Chapter 666, Sex Related Offenses, of Part Six—General Offenses Code of the Codified Ordinances of the City of South Euclid, Ohio be and the same is hereby amended by adding, thereto, new subsections 'l' and 'm' to read as follows:

" '666.01 DEFINITIONS

"[']](1) "Brothel" means any [149] place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purposes of engaging in group sex, sexual conduct and sexual acts,

as herein defined, lewdness or acts of gross and wanton indecency in sexual relations or other sexual activity which corrupts or tends to corrupt the morals of persons in the community.

"['m] "Lewdness" means sexual conduct or relations of such gross indecency and so notorious as to corrupt community morals.'

"*Section 2.* That Section 666.07, Procuring, as contained in Chapter 666, Sex Related Offenses, of Part Six—General Offenses Code of the Codified Ordinances of the City of South Euclid, Ohio be and the same is hereby amended to read as follows:

" '666.07 BROTHEL; PATRONIZING; PROCURING; PROSTITUTION.

" '***

"[']**(c) NO PERSON, ORGANIZATION, CLUB OR ASSOCIATION SHALL OWN, OPERATE, MAINTAIN OR MANAGE A BROTHEL OR SOLICIT, INVITE OR ENTICE ANOTHER TO PATRONIZE A BROTHEL OR TO ENGAGE IN ACTS OF LEWDNESS OR SEXUAL CONDUCT AS HEREIN DEFINED.**

"[']**(d) WHOEVER VIOLATES THIS SECTION IS GUILTY OF A MISDEMEANOR OF THE FIRST DEGREE AND SHALL BE PUNISHED AS PROVIDED IN SECTION 698.02.**[']

"***

"*Section 4.* That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, safety and welfare of the City, and for the further reason that same

is necessary in the current operation of the Police Department. Wherefore, this Ordinance shall take effect upon passage and approval."

Ordinance No. 36-86 amended two then-existing sections, 666.01 and 666.07, of the Codified Ordinances of the city of South Euclid. Section 666.01 was amended by adding definitions of "brothel" and "lewdness" to the codified ordinances. Section 666.07 was amended by adding paragraphs (c) and (d).

At some point subsequent to the passage of Ordinance No. 36-86, although the exact date is not clear from the record, Codified Ordinance No. 666.01 was renumbered to 533.01, and Codified Ordinance No. 666.07 was renumbered to 533.08.

On December 30, 1986, defendants-appellees, Daiva Richardson and Ronnie Richardson, were each charged in separate complaints with operating a brothel in violation of South Euclid Codified Ordinance Section 533.08(C), a first degree misdemeanor. Both defendants-appellees entered pleas of not guilty to the charges.

On March 13, 1987, the appellees filed identical motions to dismiss the complaints filed against them, with identical memoranda in support of the motions. On that same date, the American Civil Liberties Union of Cleveland ("ACLU") filed a motion for leave to file a brief as *amicus curiae*.

The appellees' motions to dismiss the complaints alleged that Ordinance No. 36-86 was "unconstitutional on its face and as applied," citing the following reasons: vagueness, overbreadth, abridgement of freedom of association, abridgement of a right to privacy, and a denial of equal protection. On April 27, 1988, the ACLU filed a brief which argued that the statute was "unconstitutionally vague and facially invalid."

On April 27, 1987, an oral hearing on appellees' motions to dismiss was [150] held in the South Euclid Municipal Court. No transcript of this hearing is included in the record on appeal. On May 12, 1987, South Euclid filed a brief in opposition to appellees' motions to dismiss, claiming, *inter alia*, that Ordinance No. 36-86 is "neither vague [nor] overbroad."

On June 26, 1987, the South Euclid Municipal Court issued a twenty-one-page opinion, dismissing the charges against both appellees. The court found that:

"*** [L]egislation must satisfy the requirements of the law and meet the standards of, and not be in conflict with, the Constitutions of the United States and [the] State of Ohio. It is these requirements and standards that Ordinance [No.] 36-86 does not meet." (Trial opinion at 5.)

Specifically, the court held that the statute was vague in its definition of the word "brothel" (Section 533.01[L]). The court examined exhaustively each term used by the city in its attempt to define "brothel" and noted the following at page 19 of its opinion:

"*** The problem here, as previously explained, is that the definition of 'brothel' in Section 533.01(L) is completely different from the well-accepted, long-standing meaning in the law of 'brothel[.]' In this Court's opinion[,] no one of ordinary or even superior intelligence would define 'brothel' in the manner set forth in Section 533.01(L); therefore, the Prosecutor's argument that Section 533.01(L) is not vague and overbroad because any citizen of ordinary intelligence knows what a 'brothel' is cannot withstand analysis. Simply stated, it is true that ordinary citizens know what a 'brothel' is, but this fact cannot save 533.01(L). This is so because no

one could anticipate that 'brothel' had the meaning attributed to it by Section 533.01(L), and Section 533.01(L) is written in a manner that cannot withstand constitutional analysis."

The charges against the appellees were dismissed. From this dismissal, South Euclid appeals.

South Euclid submits the following assignment of error:

"The trial court erred in granting each defendant's motion to dismiss [the] complaint and in discharging each such defendant."

The trial court set forth three reasons behind its decision that the South Euclid ordinance under which the appellees were charged is unconstitutional: "*** [T]he manner in which 'brothel' is defined in Section 533.01(L) is void for vagueness, overbreadth and is unconstitutional on its face." (Trial opinion at 5-6.)

A statute is void for vagueness if it " 'fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute.' " *Papachristou v. City of Jacksonville* (1972), 405 U.S. 156, 162. The Ohio Supreme Court has stated that "*** 'the proper standard for determining if a statute is vague is found in *Connally v. General Construction Co.* (1926), 269 U.S. 385 ***.' " *State v. Young* (1980), 62 Ohio St. 2d 370, 372, 16 O.O. 3d 416, 417, 406 N.E.2d 499, 501.

" 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render

them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential [151] of due process of law. ***' (Citations omitted.)" *State v. Young, supra.* See, also, *Cleveland v. Arcano* (1983), Cuyahoga App. Nos. 45076 and 45077, unreported.

A statute is overbroad "*** when the scope of the statute is so broad that it includes activity which would otherwise be legal. ***" *State v. Forbes* (Aug. 9, 1979), Cuyahoga App. No. 40879, unreported, at 3, affirmed *sub nom. State v. Young, supra.* As noted in *NAACP v. Alabama* (1964), 377 U.S. 288, 307:

"This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms. ***"

See, also, *Grayned v. City of Rockford* (1972), 408 U.S. 104, 114, where the United States Supreme Court stated:

"A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." (Footnote omitted.)

The definition of "brothel" set forth in South Euclid Ordinance No. 36-86 is:

" 'Brothel' means any place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purposes of engaging in

group sex, sexual conduct and sexual acts, as herein defined, lewdness or acts of gross and wanton indecency in sexual relations or other sexual activity which corrupts or tends to corrupt the morals of persons in the community."

We note that the definition requires the "place, house or dwelling" which is allegedly a brothel be "maintained and/or operated *** for the purposes of engaging in group sex, sexual conduct and sexual acts, *as herein defined* ***" (Emphasis added.) But, as pointed out by the trial court:

"*** This Court has searched the South Euclid Ordinances and it cannot find such definitions. If an ordinance makes certain activities a crime and then states that a definition of such activities will be set forth therein so that a citizen will understand what is illegal and what is not and can govern his conduct accordingly, that citizen is entitled to be apprised of the definition which the ordinance promises will be afforded to him. ***" (Footnote omitted.) (Trial opinion at 11.)

The clear result of the failure by the city of South Euclid to set forth the definitions of the prohibited conduct means that persons who may be subject to the ordinance are not given "a reasonable opportunity to know what is prohibited so that he may act accordingly." *Grayned v. City of Rockford, supra*, at 108. See, also, *State v. Young, supra*, at 372-373, 16 O.O. 3d at 417, 406 N.E. 2d at 501.

Although men of "reasonable intelligence" may understand the meaning of "group sex," absent a definition of sexual conduct or sexual acts, it is impossible to know what kinds of sexual relations are prohibited by Ordinance No. 36-86.

A review of the Ohio Revised Code makes clear another fundamental problem with Ordinance No. 36-86—overbreadth. "Sexual acts" and "group sex" are not defined, but "sexual conduct" is defined in R.C. 2907.01(A):

" 'Sexual conduct' means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

[152] Under appellant's ordinance, then, if the above definition were incorporated into Ordinance No. 36-86 and any of the activities listed in the above definition occurred between a married, heterosexual couple within the South Euclid city boundaries, the activities would be unlawful under the ordinance as it reads, yet these activities are clearly constitutionally protected. *Griswold v. Connecticut* (1965), 381 U.S. 479.

Furthermore, if the city of South Euclid did not intend to regulate sexual activities between married heterosexual couples, which we assume it did not, then a reading of the entire definition of "brothel" in Ordinance No. 36-86 makes it virtually impossible to determine what activities appellant did intend to regulate.

Reliance on the final phrase of the "brothel" definition, "*** which corrupts or tends to corrupt the morals of persons in the community," is of no assistance. To attempt to regulate sexual activities by the use of that standard is constitutionally prohibited, as it allows for "harsh and discriminatory enforcement by local prosecuting officials against particular groups deemed to merit their displeasure ***." *Thornhill v. Alabama* (1940), 310 U.S. 88, 97-98. See, also, *Papachristou v. City of Jacksonville, supra*, and *NAACP v. Alabama, supra.*

In light of the foregoing, we find it unnecessary to discuss the other alleged infirmities of the ordinance. We hold that Ordinance No. 36-86 is unconstitutionally vague and overbroad on its face and, as a result, as applied against these appellees. The judgment of the trial court is affirmed.

We further hold, in response to appellees' request for costs and attorney fees in accordance with App. R. 23, and after a thorough and enlightening review of the entire record, that the city of South Euclid's appeal is not frivolous and, accordingly, appellees' request for damages under App. R. 23 is denied.

The judgment of the trial court is affirmed.

Judgment affirmed.

MARKUS and JACKSON, *JJ.*, concur.

JAMES J. JACKSON, *J.*, of the Court of Common Pleas of Lake County, sitting by assignment.

WRIGHT, *J.*, dissenting. The city of South Euclid adopted an ordinance aimed at restraining sexual permissiveness. Specifically it outlawed maintaining a brothel for purposes of sexual activity such as group sex. Admittedly, the ordinance is not a model of clarity. However, I think it disingenuous to imply that a reasonable person would not understand terms such as "sexual conduct," "sexual activity," or "group sex." In light of well-established principles of analysis pertaining to vagueness and overbreadth, I must dissent from the majority's holding that South Euclid's Ordinance No. 36-86 is unconstitutional.

The void-for-vagueness inquiry turns on two questions. The court of appeals took note of the first, which is whether the ordinance puts a person of ordinary intelligence on notice of what conduct the statute forbids. As we held in *State v. Young* (1988), 37 Ohio St. 3d 249, 252, 525 N.E. 2d 1363, 1368, "*** [a]ny term which is not defined by a statute is accorded its common, ordinary meaning. ***" The meaning of "group sex" is sufficiently clear to a person of ordinary intelligence, as the court of appeals conceded. Moreover, R.C. 2907.01(A) defines "sexual con-[153]-duct" in what I consider sufficiently specific terms to supply the requisite notice.[1] It strains credulity to suggest that the Richardsons could not have known the nature of the sexual acts proscribed by the ordinance.

The second question, not addressed by the court of appeals, is whether the alleged vagueness in the ordinance proscribed the actual conduct of the Richardsons. If the vague language pertains only to hypothetical conduct in which the defendants were not alleged to have engaged, the statute is not void as a result. As the United States Supreme Court explained in *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 608: "*** [E]ven if the outermost boundaries of *** [a statute] may be imprecise, any such uncertainty has little relevance here, where *** [defendants'] conduct falls squarely within the 'hard core' of the statute's proscriptions ***.

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[1] R.C. 2907.01(A) defines "sexual conduct" as follows:

" 'Sexual conduct' means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus betwen persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse."

The court of appeals' speculation about a married couple being prosecuted for sexual conduct under the ordinance is beside the point. The ordinance is not void for vagueness if the activities of which the defendants here were accused are clearly proscribed by the ordinance, even if other proscriptions of the same ordinance are so vaguely worded as not to put ordinarily intelligent persons on notice of what conduct is unlawful.

Unfortunately, because the case was dismissed, no factual record was developed at trial. Appellant suggests, however, that had it been able to proceed it would have shown that the defendants for a $25 fee conducted regularly scheduled group sex parties at their residence which the plain and unambiguous "hard core" of Ordinance No. 36-86 prohibits. Moreover, by outlawing group sex parties, the city of South Euclid did not violate a fundamental constitutional right. In *Bowers v. Hardwick* (1986), 478 U.S. 186, the United States Supreme Court refused to extend the constitutional protection afforded sexual relations between a married couple by *Griswold v. Connecticut* (1965), 381 U.S. 479, to sexual relations between homosexual or other consenting adults, *id.* at 195-196, including, presumably, attendees at group sex parties.

The courts below also held the ordinance to be overbroad on its face and as applied. Unlike vagueness, facial overbreadth can invalidate a statute based on hypothetical applications that would prohibit constitutionally protected activities, even if defendants' alleged actual conduct was clearly proscribed by the statute. See, *e.g.*, *Coates v. Cincinnati* (1971), 402 U.S. 611; *Dombroski v. Pfister* (1965), 380 U.S. 479. However, as we noted in *State v. Young, supra*, at 251, 525 N.E. 2d at 1367: "*** Where *** a statute regulates conduct

rather than pure speech, *its overbreadth '*** must not only be real, but substantial as well,* judged in relation to the statute's plainly legitimate sweep.' *Broadrick v. Oklahoma* (1973), 413 U.S. 601, 615." (Emphasis added.) Ordinance No. 36-86 does not regulate pure speech but sexual conduct, and its intended "plainly legitimate sweep" is prohibition of such constitutionally unprotected activities as group sex and sexual conduct among persons who are not married to each other, activities associated with the operation of a [154] brothel. When pure speech is not involved, the United States Supreme Court has refused to declare a statute unconstitutional on account of facial overbreadth unless "*** it reaches a substantial number of impermissible applications. ***" *New York v. Ferber* (1982), 458 U.S. 747, 771. The only plainly impermissible application of the ordinance put forth by the court below was prosecution of a husband and wife for operating a brothel by engaging in marital relations alone in their own home. Given the legitimate purpose of the ordinance and the great unlikelihood of such an application, I cannot agree that the ordinance is overbroad on its face. See *State v. Diana* (1976), 48 Ohio St. 2d 199, 2 O.O. 3d 387, 357 N.E. 2d 1090, certiorari denied (1977), 431 U.S. 917.

If the ordinance is not overbroad on its face, it cannot follow that it is therefore overbroad as applied. For the application of Ordinance No. 36-86 to the Richardsons to be overbroad as applied, the actual conduct for which they were prosecuted would have to enjoy constitutional protection. But as noted above, in *Bowers, supra,* the United States Supreme Court refused to extend the fundamental right of privacy announced in *Griswold, supra,* to anyone other than married couples. Had it been allowed to proceed, the city of South Euclid

would have had an opportunity to show how it applied the ordinance to the specific conduct of the Richardsons in operating a brothel,[2] and the trial court could have decided whether their alleged conduct was constitutionally protected or permissibly proscribed by the ordinance.

For the foregoing reasons, I would reverse the judgment of the court of appeals and remand the cause for trial.

DOUGLAS and RESNICK, *JJ.*, concur in the foregoing dissenting opinion.

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[2] Webster's Third New International Dictionary (1986) 284, defines "brothel" as follows:

"*** an establishment (as a house or apartment) in which prostitutes are domiciled and ply their trade usu. as employees or on a commission basis, the keeping of such an establishment being at common law and usu. by statute a misdemeanor[.]"

APPENDIX B

Decision of the Court of Appeals of Cuyahoga County, Ohio

(Decided August 18, 1988)

Nos. 54247 and 54248

COURT OF APPEALS OF OHIO,
EIGHTH DISTRICT

COUNTY OF CUYAHOGA

CITY OF SOUTH EUCLID,
Plaintiff-Appellant,

vs.

DAIVA RICHARDSON [Case No. 54247]
RONNIE RICHARDSON [Case No. 54248],
Defendants-Appellees.

JOURNAL ENTRY AND OPINION

DATE OF ANNOUNCEMENT OF DECISION:
AUGUST 18, 1988

CHARACTER OF PROCEEDING:
Criminal appeal from South Euclid Municipal Court, Nos. 86-CRB-414 and 86-CRB-413.

JUDGMENT:
Affirmed.

DATE OF JOURNALIZATION:
AUGUST 29, 1988

APPEARANCES:

For Plaintiff-Appellant:
Victor E. DeMarco, Esq.
Robert P. DeMarco, Esq.
1349 South Green Road
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For Defendants-Appellees:
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Cleveland, OH 44113

DAVID T. MATIA, *P.J.*:

In case number 54247, plaintiff-appellant City of South Euclid appeals from the South Euclid Municipal Court's dismissal of plaintiff-appellant's criminal complaint against defendant-appellee Daiva Richardson. In case number 54248, plaintiff-appellant City of South Euclid appeals from the South Euclid Municipal Court's dismissal of plaintiff-appellant's criminal complaint against defendant-appellee Ronnie Richardson.

Pursuant to this court's order of August 28, 1987, in response to plaintiff-appellant City of South Euclid's motion to consolidate appeals which was filed August 12, 1987, and in accordance with Ohio Rule of Appellate Procedure 3(B) and Eighth District Court of Appeals Local Rule 3(B)(3), case number 54247, *City of South Euclid v. Daiva Richardson*, and case number 54248, *City of South Euclid v. Ronnie Richardson* were consolidated for appeal and are therefore discussed and decided together.

On October 14, 1986, the South Euclid City Council, by a vote of 6-0, passed South Euclid City Ordinance 36-86, designating it an emergency ordinance:

"*Section 1.* That Section 666.01 Definitions, as contained in Chapter 666, Sex Related Offenses, of Part Six-General Offenses Code of the Codified Ordinances of the City of South Euclid, Ohio be and the same is hereby amended by adding, thereto, new subsections 'l' and 'm' to read as follows:

" '666.01 DEFINITIONS

' "l" "Brothel" means any place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purposes of engaging in group sex, sexual conduct and sexual acts, as herein defined, lewdness or acts of gross and wanton indecency in sexual relations or other sexual activity which corrupts or tends to corrupt the morals of persons in the community.

' "m" 'Lewdness" means sexual conduct or relations of such gross indecency and so notorious as to corrupt community morals.'

"*Section 2.* That Section 666.07, Procuring, as contained in Chapter 666, Sex Related Offenses, of Part Six-General Offenses Code of the Codified Ordinances of the City of South Euclid, Ohio be and the same is hereby amended to read as follows:

" '666.07 BROTHEL; PATRONIZING; PROCURING; PROSTITUTION.

* * *

'(c) NO PERSON, ORGANIZATION, CLUB OR ASSOCIATION SHALL OWN, OPERATE, MAINTAIN OR MANAGE A BROTHEL OR SOLICIT, INVITE OR ENTICE ANOTHER TO PATRONIZE A BROTHEL OR TO ENGAGE IN ACTS OF LEWDNESS OR SEXUAL CONDUCT AS HEREIN DEFINED.

"(d) WHOEVER VIOLATES THIS SECTION IS GUILTY OF A MISDEMEANOR OF THE FIRST DEGREE AND SHALL BE PUNISHED AS PROVIDED IN SECTION 698.02.[']

* * *

"*Section 4.* That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, safety and welfare of the City, and for the further reason that same is necessary in the current operation of the Police Department. Wherefore, this Ordinance shall take effect upon passage and approval."

Ordinance 36-86 amended two then existing sections, 666.01 and 666.07, of the Codified Ordinances of the City of South Euclid. Sections 666.01 was amended by adding definitions of "brothel" and "lewdness" to the Codified Ordinances. Section 666.07 was amended by adding paragraph (c) and paragraph (d), both of which are printed, *supra.*

At some point subsequent to the passage of Ordinance 36-86, although the exact date is not clear from the record, Codified Ordinance Number 666.01 was renumbered to 533.01; and Codified Ordinance Number 666.07 was renumbered to 533.08.

On December 30, 1986, defendants-appellees Daiva Richardson and Ronnie Richardson were each charged in separate complaints with operating a brothel in violation of South Euclid Codified Ordinance section 533.08(c) (formerly section 666.07(c)), a first degree misdemeanor. Both defendants-appellees entered pleas of not guilty to the charges.

On March 13, 1987, each defendant-appellee filed identical motions to dismiss the complaints filed against them, with identical memoranda in support of the motions. On that same date, the American Civil Liberties Union of Cleveland (hereinafter ACLU) filed a motion for leave to file brief as *amicus curiae*.

Defendants-appellees' motion to dismiss the complaints alleged that Ordinance Number 36-86 was "unconstitutional on its face and as applied", citing the following reasons: vagueness; overbreadth; abridgement of freedom of association; abridgement of a right to privacy; and a denial of equal protection. On April 27, 1988, the ACLU filed a brief of *amicus curiae* which argued that the statute was "unconstitutionally" vague and facially invalid".

On April 27, 1987, an oral hearing for defendants-appellees' motion to dismiss was held in the South Euclid Municipal Court. No transcript of this hearing is included in the record on appeal. On May 12, 1987, plaintiff-appellant City of South Euclid filed a brief in opposition to defendants-appellees' motions to dismiss, claiming, *inter alia*, that Ordinance 36-86 is "neither vague or overbroad".

On June 26, 1987, the South Euclid Municipal Court issued a 21-page opinion, dismissing the charges against both defendants-appellees. The court found that:

> "The legislation (Ordinance 36-86) must satisfy the requirements of the law and meet the standards of, and not be in conflict with, the constitutions of the United States and State of Ohio. It is these requirements and standards that Ordinance 36-86 does not meet." (Opinion, p. 5).

Specifically, the court held that the statute was vague in its definition as to the word "brothel" (section 533.01(L)); and examined exhaustively each term used by the city in its attempt to define "brothel". As the court noted on page 19 of its opinion:

> "*** The problem here, as previously explained, is that the definition of 'brothel' in Section 533.01(L) is completely different from the well-accepted, long-standing meaning in the law of 'brothel'[.] In this Court's opinion, no one of ordinary or even superior intelligence would define 'brothel' in the manner set forth in Section 533.01(L); therefore, the Prosecutor's argument that Section 533.01(L) is not vague and overbroad because any citizen of ordinary intelligence knows what a 'brothel' is cannot withstand analysis. Simply stated, it is true that ordinary citizens know what a 'brothel' is, but this fact cannot save 533.01(L). This is so because no one could anticipate that 'brothel' had the meaning attributed to it by Section 533.01(L), and Section 533.01(L) is written in a manner that cannot withstand constitutional analysis."

The charges against the defendants-appellees were dismissed. From this dismissal, plaintiff-appellant City of South Euclid appeals.

Plaintiff-appellant City of South Euclid submits the following assignment of error:

I.

"THE TRIAL COURT ERRED IN GRANTING EACH DEFENDANT'S MOTION TO DISMISS COMPLAINT AND IN DISCHARGING EACH SUCH DEFENDANT."

The trial court set forth three reasons behind its decision that the South Euclid Ordinance under which the defendants-appellees were charged is

unconstitutional: "*** and the manner in which 'brothel' is defined in Section 533.01(L) is void for vagueness, overbreadth and is unconstitutional on its face." Opinion, pp. 5-6.

A statute is void for vagueness if it "fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by statute." *Papachristou v. City of Jacksonville* (1972), 405 U.S. 163. The Ohio Supreme Court has stated that "the proper standard for determining if a statute is vague is found in *Connelly v. General Construction Company* (1926), 269 U.S. 385."

> " 'That the terms of a penal statute creating a new offense must be sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties, is a well-recognized requirement, consonant alike with ordinary notions of fair play and the settled rules of law. And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. ***' (Citations omitted.)" *State v. Young* (1980), 62 Ohio St. 2d 370, 372. See also *City of Cleveland v. Arcano* (1983), Cuyahoga App. Nos. 45076 and 45077, unreported.

A statute is overbroad "*** when the scope of the statute is so broad that it includes activity which would otherwise be legal." *State v. Forbes* (1979), Cuyahoga App. No. 40879, unreported. As noted in *N.A.A.C.P. v. Alabama* (1964), 377 U.S. 288, 307:

> "This Court has repeatedly held that a governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms."

See also, *Grayned v. City of Rockford* (1972), 408 U.S. 104, where the United States Supreme Court stated:

> "A clear and precise enactment may nevertheless be 'overbroad' if in its reach it prohibits constitutionally protected conduct." (Footnote omitted).

The definition of "brothel" set forth in plaintiff-appellant City of South Euclid's City Ordinance 36-86 is:

> " 'Brothel' means any place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purposes of engaging in group sex, sexual conduct and sexual acts, as herein defined, lewdness or acts of gross and wanton indecency in sexual relations or other sexual activity which corrupts or tends to corrupt the morals of persons in the community."

We note that the definition requires the "place, house or dwelling" which is allegedly a brothel be "maintained and/or operated *** for the purposes of engaging in group sex, sexual conduct and sexual acts, *as herein defined,* ***" (Emphasis added). But, as pointed out by the trial court:

> "This Court has searched the South Euclid Ordinances and it cannot find such definitions. If an ordinance makes certain activities a crime and then states that a definition of such activities will be set forth therein so that a citizen will understand what is illegal and what is not and can govern his conduct accordingly, that citizen is entitled to be apprised of the definition which the ordinance promises will be afforded to him." Opinion, p. 11, footnote omitted.

The clear result of the failure by the plaintiff-appellant City of South Euclid to set forth the definitions of the prohibited conduct means that persons who may be subject to the ordinance are not given "a

reasonable opportunity to know what is prohibited so he may act accordingly." *Grayned v. City of Rockford, supra*, at 108. See also *State v. Young, supra*, at 372-373.

Although men of "reasonable intelligence" may understand the meaning of "group sex", absent a definition of sexual conduct or sexual acts, it is impossible to know what kind of sexual relations are prohibited by Ordinance 36-86.

A review of the Ohio Revised Code makes clear another fundamental problem with Ordinance 36-86, overbreadth. Sexual acts and group sex are not defined, but sexual conduct is:

> "(A) 'Sexual conduct' means vaginal intercourse between a male and female, and anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." Ohio Revised Code Section 2907.01(A).

Under the plaintiff-appellant's ordinance, then, if the above definition were incorporated into Ordinance 36-86 and any of the activities listed in the above definition occurred between a married, heterosexual couple within the South Euclid City boundaries, the activities would be unlawful under the ordinance as it reads, yet these activities are clearly constitutionally protected. *Griswold v. Connecticut* (1965), 381 U.S. 479.

Furthermore, if the plaintiff-appellant City of South Euclid did not intend to regulate sexual activities between married heterosexual couples, which we assume it did not, then a reading of the entire definition of "brothel" in Ordinance 36-86 makes it virtually impossible to determine what activities plaintiff-appellant did intend to regulate.

Reliance on the final phrase of the "brothel" definition: "*** which corrupts or tends to corrupt the morals of persons in the community" is of no assistance. Whatever activities listed in Ordinance 36-86 "tend(s) to corrupt the morals of persons in the community", to attempt and regulate sexual activities by the use of that standard is constitutionally prohibited, for it allows for "harsh and discriminatory enforcement by local prosecuting officials, against particular groups deemed to merit their displeasure." *Thornhill v. Alabama* (1940), 310 U.S. 88, 97-98. See also *Papachristou v. City of Jacksonville, supra*, and *N.A.A.C.P. v. Alabama, supra*.

In light of the foregoing, we find it unnecessary to discuss the other alleged infirmities of the ordinance. We hold that Ordinance 36-86 is unconstitutionally vague and overbroad on its face, and as a result, as applied against these defendants-appellees. The judgment of the trial court is affirmed.

We further hold, in response to defendant-appellees' request for costs and attorney's fees in accordance with Ohio Rule of Appellate Procedure 23, and after a thorough and enlightening review of the entire record, that plaintiff-appellant City of South Euclid's appeal is not frivolous and, accordingly, defendant-appellees' request for damages under Ohio Appellate Rule 23 is denied.

Judgment affirmed.

It is ordered that appellant recover of appellees its costs herein taxed.

The court finds there were reasonable grounds for this appeal.

It is ordered that a special mandate issue out of this court directing the South Euclid Municipal Court to carry this judgment into execution. The judgement of the South Euclid Municipl Court is affirmed.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

MARKUS, *J.* and
* JACKSON, *J.*, concur.

/s/ DAVID T. MATIA
Presiding Judge

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* Judge James W. Jackson, of the Lake County Common Pleas Court, sitting by assignment.

APPENDIX C

Opinion of the South Euclid Municipal Court, Cuyahoga County, Ohio

(Dated June 26, 1987)

IN THE SOUTH EUCLID
MUNICIPAL COURT

CUYAHOGA COUNTY, OHIO

Case No. 86-CR-B-413

CITY OF SOUTH EUCLID,
Plaintiff,

vs.

RONNIE RICHARDSON,
Defendant.

and

Case No. 86-CR-B-414

CITY OF SOUTH EUCLID,
Plaintiff,

vs.

DAIVA RICHARDSON,
Defendant.

OPINION

On October 14, 1986, the Council of the City of South Euclid passed Ordinance No. 36-86 to accomplish the following purposes:

(1) To amend Section 666.01 entitled "Definitions" of the Ordinances of the City of South Euclid by adding new subsections "l" and "m", and

(2) To amend Section 666.07 entitled "Procuring" as contained in Chapter 666 entitled "Sex Related Offenses".

The relevant part of Ordinance No. 36-86 reads as follows:

Section 1. That Section 666.01 Definitions, as contained in Chapter 666, Sex Related Offenses, of Part Six-General Offenses Code of the Codified Ordinances of the City of South Euclid, Ohio be and the same is hereby amended by adding, thereto, new subsections "l" and "m" to read as follows:

"666.01 DEFINITIONS

"l' "Brothel" means any place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purposes of engaging in group sex, sexual conduct and sexual acts, as herein defined, lewdness or acts of gross and wanton indecency in sexual relations or other sexual activity which corrupts or tends to corrupt the morals of persons in the community.

"m" "Lewdness" means sexual conduct or relations of such gross indecency and so notorious as to corrupt community morals."

Section 2. That Section 666.07, Procuring, as contained in Chapter 666, Sex Related Offenses, of Part Six-General Offenses Code of the Codified Ordinances of the City of South Euclid, Ohio be and the same is hereby amended to read as follows:

"666.07 BROTHEL; PATRONIZING; PROCURING: PROSTITUTION.

* * *

(c) NO PERSON, ORGANIZATION, CLUB OR ASSOCIATION SHALL OWN, OPERATE, MAINTAIN OR MANAGE A BROTHEL OR SOLICIT, INVITE OR ENTICE ANOTHER TO PATRONIZE A BROTHEL OR TO ENGAGE IN ACTS OF LEWDNESS OR SEXUAL CONDUCT AS HEREIN DEFINED.

(d) WHOEVER VIOLATES THIS SECTION IS GUILTY OF A MISDEMEANOR OF THE FIRST DEGREE AND SHALL BE PUNISHED AS PROVIDED IN SECTION 698.02.

* * *

Section 4. That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, safety and welfare of the City, and for the further reason that same is necessary in the current operation of the Police Department. Wherefore, this Ordinance shall take effect upon passage and approval.

On December 30, 1986, charges were brought by the City of South Euclid against the Defendants, Ronnie Richardson and Daiva Richardson. The Complaints* filed by the City against the Defendant read as follows:

> Complainant being duly sworn states that Ronnie Richardson at City of South Euclid, Cuyahoga County, Ohio during the period of time from October 16, 1986 through and including December 20, 1986, defendant did own, operate, maintain or manage a brothel as defined in Section 533.01 (L) (formerly Section 666.01 as amended by Ordinance 36-86) of the Codified Ordinances of the City of South Euclid

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* The language of the Complaint against Ronnie Richardson is identical to the one against Daiva Richardson; therefore, only the Complaint against Ronnie Richardson is quoted in this Opinion.

at 1552 Maplegrove Road, South Euclid, Ohio in violation of Section 533.08 (C) (formerly Section 666.07 as amended by Ordinance 36-86) of the Codified Ordinances of the City of South Euclid and against the peace and dignity of the City of South Euclid, Ohio.

On January 7, 1987, each Defendant entered a not guilty plea to the above charge. On March 13, 1987, each Defendant filed a Motion to Dismiss the Complaint pursuant to Criminal Rule 12. These Motions alleged the grounds therefor as follows:

> The ground for this motion is that the ordinance under which the defendants have been charged is unconstitutional on its face and as applied to defendants, who are husband and wife. Specifically, the ordinance is unconstitutional on its face and as applied in each of the following respects:
>
> 1. The ordinance is unconstitutionally vague and overbroad, in violation of the First and Fourth Amendments to the United States Constitution and Article I of the Ohio Constitution.
>
> 2. The ordinance is an unconstitutional abridgement of the freedom of association and right of privacy guaranteed by the First, Fourth, Ninth and Fourteenth Amendments to the United States Constitution and by the Ohio Constitution.
>
> 3. The ordinance constitutes a denial of equal protection of the law guaranteed by the Fourteenth Amendment to the United States Constitution and by the Ohio Constitution.

Oral Hearings were held on these Motions and, thereafter, both parties filed Post Hearing Briefs.

The City Prosecutor has stated in his brief in Opposition to Defendants' Motions to Dismiss the Complaints that a very bad situation had arisen on the

street of Maple Grove in the City of South Euclid as a result of the anger of the neighborhood to the Defendants' operating an organization known as The North Coast Club "... for the purpose of promoting and conducting sex parties" in their home and by "... inviting to such activity people from all over the state". This anger, according to the Brief of the City Prosecutor, caused the neighbors to react "in a manner detrimental to the maintenance of law and order ..." with the result being "... damage to property, injury to person and a near riot ...". The City Prosecutor further states in his brief that, in reviewing the existing ordinances of the City of South Euclid, a determination was made that "... certain code provisions should be clarified by defining the terms 'brothel', 'lewdness', etc. ..." and that this determination resulted in the Ordinances of the City of South Euclid being amended "... to provide that the solicitation without more, of one to patronize a brothel and engage in lewdness or sexual conduct as defined was prohibited". If the foregoing recitation of the facts accurately depicts the situation created by the Defendants activities, there can be no question that the motives of the South Euclid City Council in passing Ordinance No. 36-86 were predicated on a very well intentioned effort to protect the residents of Maple Grove against conduct which they believed was a very detrimental influence, particularly to young people and children. However, in drafting legislation, good intentions alone are not enough. The legislation must satisfy the requirements of the law and meet the standards of, and not be in conflict with, the Constitutions of the United States and State of Ohio. It is these requirements and standards that Ordinance 36-86 does not meet.

The Defendants have been charged with operating a "brothel" as defined in Section 533.01(L)* in violation of Section 533.08(C).* This Court has no problem with an ordinance making the operation of a "brothel" a crime provided the word "brothel" is defined in a manner that conforms with the common and well accepted meaning of that term under the law, to wit: a place where prostitutes engage in sexual intercourse or other sexual activities for hire, these being places commonly known as houses of ill fame, bawdy houes and, in the vernacular, "whore houses". The problem here is that the Defendants are charged with the operation of a "brothel" as defined in Section 533.01(L)", and the manner in which "brothel' is defined in Section 533.01(L) is void for vagueness, overbreadth and is unconstitutional on its face. The definition is also different from the legal definition of this word, as evidenced by the fact that a "brothel" is defined in Ballentine's Law Dictionary (Second Edition) as a "bawdy-house", a "house of ill fame". Bawdy-house is defined as:

> A house of ill fame; a house resorted to for the purpose of prostitution. . . . .

House of ill fame is defined as:

> A disorderly house; a bawdyhouse. To constitute the place a house of ill fame, it must be resorted to more than once for the purpose of prostitution and lewdness by others than the proprietor, though it need not be used habitually or for any considerable length of time for such purpose. It has been held that any number of illicit acts with the proprietor will not make the place a house of ill fame. 17 Am.Jur. 105. . . .

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* The South Euclid Ordinances were renumbered. What is now Section 533.01(L) was formerly Section 666.01(l), and what is now Section 533.08(C) was formerly Section 666.07(C).

Section 533.01(L) does not give a person fair notice of what acts are criminally prohibited and the language of this Section is so broad as to embrace on its face activities which are, by modern standards, normally innocent so as to be constitutionally protected. Simply stated, the definition of "brothel" in Section 533.01(L) is a "catch all" of such breadth that it infringes on constitutionally protected rights. One of the core difficulties with Section 533.01(L) was very ably articulated as follows by the American Civil Liberties Union in their brief filed as amicus curiae:

> One of the most basic tenets of due process is that all persons are entitled to be informed of what the law prohibits and permits, in order that they may choose a lawful course of conduct. If a legislative enactment fails to give this information, it is void for vagueness "in the sense that 'it fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. . . .'" *Papachristou v. City of Jacksonville*, 405 U. S. 156, 162, 92 S. Ct. 839, 843 (1972). As the vagueness test was formulated in *Coates v. Cincinnati*, 402 U. S. 611, 91 S. Ct. 1686 (1971), a statute or ordinance is invalid if it "is vague, not in the sense that it requires a person to conform his conduct to an imprecise but comprehensible normative standard, but rather in the sense that no standard of conduct is specified at all, [and] as a result, 'men of common intelligence must necessarily guess at its meaning,'" *Id.* at 614, 91 S. Ct. at 1688.

The fundamental principle of constitutional law underlying the hereinabove statement by the American Civil Liberties Union was enunciated as follows by the Supreme Court of the United States in *Grayned v. City of Rockford*, 408 U. S. 104, 92 S. Ct. 2294 (1972):

> Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws

> give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application. 408 U. S. 108-109, 92 S. Ct. 2298-2299.

In their briefs filed in support of their Motions to Dismiss, Defendants urge that there is "utter vagueness" in the words and phrases used in the definition of "brothel" and that this ". . . definition in its totality does such violence to accepted rules of grammar and usage as to render the ordinance undecipherable". On pages 7-8 of the briefs filed with their Motions to Dismiss, Defendants explain the basis for the foregoing view as follows:

> In the first place, brothel is defined as a place, house or dwelling operated for certain "purposes". Clearly, City Council has consciously elected to use the plural "purposes" rather than the singular "purpose". But the language which follows the word "purposes" identifies at least six separate types of activity, some of which are connected by the conjunctive "and" and others of which are connected by the disjunctive "or". Thus the definition reads: ". . . for the purposes of engaging in group sex, sexual conduct *and* sexual acts . . ., lewdness *or* acts of gross and wanton indecency in sexual relations *or* other sexual activity . . ."
>
> How is a citizen who desires to conform his conduct to the requirements of this law to know what is lawful and what is unlawful? The use of the conjunctive "and" in the phrase "group sex, sexual

> conduct *and* sexual acts" suggests that there must be a purpose to engage in all three forms of this conduct before the ordinance's prohibitions are triggered. But the use of the disjunctive "or" twice in the phrase "lewdness, *or* acts of gross and wanton indecency in sexual relations *or* other sexual activity . . ." suggests that any one of those three forms of conduct would suffice to trigger the prohibitions of the ordinance.
>
> However, that latter suggestion cannot be reconciled with the use of the plural form of "purposes" which informs the citizen that a purpose to engage in more than one of the enumerated forms of conduct is required.
>
> The problem is further compounded by the fact that the second use of the disjunctive "or" in the phrase last quoted is ambiguous. It is impossible to know what the language following the second "or" in that phrase modifies. Does it modify the phrase "for the purposes of engaging in"? Or does it modify the phrase "acts of gross and wanton indecency in"? In other words, does the ordinance mean "for the purposes of engaging in . . . other sexual activity . . ."? Or does it mean "for the purposes of engaging in . . . acts of gross and wanton indecency in sexual relations or [acts of gross and wanton indecency in] other sexual activity . . ."? Because the grammar is so poor it is impossible to tell. Thus, to say about this ordinance that "men of common intelligence must necessarily guess at its meaning and differ as to its application" (*Connally v. General Construction Co.*, 269 U. S. 385, 391) is an understatement, indeed.

Without attempting to analyze each and every one of the Defendants reasons set forth in the hereinabove quoted segment of their brief and although it may be that defense counsel may have somewhat overstated the problem of interpretation and the vagueness and

overbreadth of the definition of "brothel" in Section 533.01(L), it does vividly demonstrate the difficulty a private citizen would encounter in ascertaining what type of conduct was actually encompassed by that definition. Simply stated, if an ordinance is written in a manner wherein the interconnection and relationship of the various phrases and portions thereof are so difficult to ascertain, how is a private citizen to be apprised what activities are prohibited and punishable by this Ordinance?

In the last analysis, even though the use of the word "purpose" in the plural (i.e. "purposes") and the various uses of the conjunctive and disjunctive cast a shadow on what this Court is about to say, it does seem that what was probably intended was that a "brothel" was to mean any place, house or dwelling maintained and/or operated by any person, club, etc., for *any one* of the following purposes;

(1) Engaging in group sex, sexual conduct and sexual acts, as defined herein,

(2) Lewdness or acts of gross and wanton indecency in sexual relations.

(3) Other sexual activity which corrupts or tends to corrupt the morals of persons in the community.

As already explained, the interpretation set forth above is speculative, but it is, nevertheless, in this Court's judgment, the meaning most probably intended. However, in so stating, this Court wants to make it clear that it is fully cognizant of the fact that the use of the word "purposes" (plural) strongly mitigates against this interpretation. Also, this Court recognizes that a strong

argument could be made that the final phrase "which corrupts or tends to corrupt the morals of persons in the community" was intended to modify each and every item in the definition of "brothel", not just the words "sexual activity". Nevertheless, with respect to what this phrase was intended to modify, its very use creates a serious problem with respect to the vagueness of the definition, as will be more fully explained at a later point in this Opinion.

The Defendants have directed an aspect of their attack to the language in the definition of "brothel" wherein the phrase ". . . for the purposes of engaging in group sex, sexual conduct and sexual acts, *as defined herein* . . ." (emphasis added) is used. Defendants point out that definitions of "group sex" and "sexual acts"* cannot be found anywhere in the South Euclid Ordinances. This Court has searched the South Euclid Ordinances and it cannot find such definitions.* If an ordinance makes certain activities a crime and then states that a definition of such activities will be set forth therein so that a citizen will understand what is illegal and what is not and can govern his conduct accordingly, that citizen is entitled to be apprised of the definition which the ordinance promises will be afforded to him. The basis for the foregoing statement is enunciated by Defendants on Page 9 of the briefs filed with their Motions, as follows:

> . . . What is a citizen who wants to conform his conduct to the law to think when faced with an ordinance that falsely represents to him that certain

* Defendants assume in their brief that the phrase "as defined herein" applies to all three of the preceding forms of conduct; however, another possible reading is that it only applies to "sexual acts", but, be this as it may, no definition of "sexual acts" is contained in the South Euclid Ordinances.

* There is a definition of "sexual activity", but this is not identical to "sexual acts".

> terms used in the ordinance have special definitions that can be found in the ordinance? How is he to discern the meaning of terms which he is told are defined in the ordinance when in fact, on the contrary, no such definitions are set forth in the ordinance? How can such an ordinance be squared with the fundamental principle that due process requires penal laws to give a citizen fair warning of its prohibitions? The simple answer is that such an ordinance cannot survive constitutional scrutiny.

The Defendants also urge that the language "which corrupts or tends to corrupt the morals of persons in community" which is set forth at the end of the definition of brothel ". . . is such an utterly vague and subjective standard as to render the entire ordinance unconstitutional". Furthermore, contend the Defendants on Pages 10-11 of their briefs:

> . . . it is impossible to ascertain what that clause modifies in the disjointed and clumsy definition of brothel. Does it modify all six forms of activity set forth in the definition? Or does it modify only the last three forms of activity identified in the ordinance? Or for that matter, does it only modify the phrase "or other sexual activity" which immediately precedes the clause in question?
>
> In other words, is it only that type of group sex, sexual conduct, sexual acts, lewdness, acts of gross and wanton indecency and other sexual activity "which corrupts or tends to corrupt the morals of persons in the community" that is prohibited by the ordinance? Or does the moral corruption clause apply only to "sexual activity", the phrase which immediately precedes the clause, so that the other activities set forth in the ordinance such as "sexual conduct" and "sexual acts" are banned even if not of a type "which corrupts or tends to corrupt the morals of persons in the community."?

> If this latter interpretation were correct, it would unquestionably render the entire ordinance unconstitutionally overbroad because it would mean that the ordinance's prohibitions extend to "activities which by modern standards are normally innocent. *Papachristou v. City of Jacksonville, supra*, at 405 U.S. 164.
>
> The problem is that it is impossible to decipher how and where the moral corruption clause fits into the definition of "brothel" and what that clause does and does not modify. Instead, the citizen is set adrift to speculate and guess what the ordinance means. And the potential price of a wrong guess is six months in jail and a $1,000.00 fine.

The arguments set forth above by Defendants vividly depict the constitutional infirmity of the definition of "brothel".

As mentioned in the hereinabove quoted segment of Defendants' briefs, a possible reading of "brothel" in Section 533.01(L) is that, among other things, a "brothel" is ". . . any place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purpose of engaging in . . . other sexual activity which tends to corrupt the morals of persons in the community." The following hypothetical example demonstrates the constitutional infirmity of Section 533.01(L) if this reading were intended. A young adult male rents an apartment in the City of South Euclid. His primary purpose in doing so is to entertain young ladies there. He then places the following advertisement in *Cleveland Magazine*:

> Tall, handsome athletic twenty-five year old male with beautiful apartment overlooking Cleveland Metropolitan Park would like to meet fun loving girl between the ages of 21 and 25 who likes to have a good time.

Many young females between the ages of 21 and 25 respond to this advertisement. Most of the young ladies who respond end up spending the night in the apartment with this young male. The fact that this advertisement appeared in *Cleveland Magazine* and the fact that these young females have been spending the night at this South Euclid apartment becomes well known among the occupants of the apartment building and their children. Does the "sexual activity" in this apartment tend to corrupt the morals of the occupants of the apartment building? If so, is this apartment a "brothel" within the meaning of Section 533.01(L)? Under modern standards of morality, could the maintenance of this apartment by this young male be made a criminal act punishable by a fine of $1000.00 and six months in jail, the penalty for violating Section 533.08(C)? Does the "sexual activity" in this apartment corrupt or tend to corrupt the morals of persons in the community? To some, the answer would be "yes". To others, the answer would be "no". Resort to Webster's dictionary does not help. Attached as Exhibit "A" to the brief of the American Civil Liberties Union is a definition of "morals". After pointing out that it takes Webster 110 lines of text, including twenty-four alternative definitions and a large number of synonyms to define this word, the American Civil Liberties Union concludes as follows:

> . . . The South Euclid Ordinance requires people to guess which definition is closest to the probable meaning of the city council, exposing them to criminal penalties if they guess wrong. (Page 6 of brief of American Civil Liberties Union)

The American Civil Liberties Union then states that "corrupt" is defined as: "to change from good to bad in morals, manners or actions . . . to degrade with unsound principles of moral values"; therefore, concludes the

American Civil Liberties Union, it is impossible to extract any meaning from the term "corrupt" without first having a clear definition of "morals"—a definition which is "sadly lacking" in the South Euclid Ordinances. This observation of the American Civil Liberties Union is clearly a valid one.

For the reasons set forth above, making "sexual activity which corrupts or tends to corrupt the morals of persons in the community" is just too vague and too overbroad to satisfy constitutional criteria of validity.

The City Prosecutor has cited *Bowers v. Hardwick, et al*, 106 S. Ct. 2841 (1986) in support of its position in this case. In the *Bowers* case, the Supreme Court of the United States upheld the validity of a Georgia statute which criminalized sodomy.* In so holding, the Supreme Court stated that the fact that the homosexual conduct occurred in the privacy of the home of the party charged with the offense did not affect the right of the State to make such conduct a crime. The Supreme Court was also careful to point out that proscriptions against sodomy have "ancient roots". But, clearly, one cannot equate the crime of sodomy with the plethora of sexual conduct and activity which is encompassed by the definition of "brothel" in Section 533.01(L) of the South Euclid Ordinances.

One of the problems this Court has had with Section 533.01(L) from the inception is the question of whether or not a legislative body has the right, by definition in a statute or ordinance, to significantly change the ordinary meaning of a word as it is understood in the law. It seems to this Court that what occurred here is just that.

* This statute provided: "(a) A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another . . .

Because the operation of a "brothel" can be made an illegal act, the City of South Euclid drafted a piece of legislation that defines a "sex club" and various other activities as being a "brothel" *without* this definition containing the historically recognized elements of a "brothel". The fact that there is something inherently wrong with this is vividly demonstrated by the following example:

> The City Council of Riversville passes an ordinance making the operation of a "brothel" a crime. The definition of "brothel" includes a place, house or dwelling where any person views an X-rated movie. A resident of Riversville regularly rents X-rated movies and takes them to his home. While viewing such a movie, he is arrested by the police and charged with operating a "brothel". He is convicted of this crime and sentenced to six months in jail.

The resident of Riversville described above was operating a "brothel" as that term was defined in the ordinance, at the time he was watching the X-rated movie in his home. There is something inherently wrong with this. A three judge Federal Court in *Wheeler v. Goodman*, 306 F. Supp. 58 (vacated on other grounds, 401 U.S. 987, 1971) had this to say about a legislative body defining a word in a way which was contrary to its commonly accepted meaning:

> Sections 5 and 7 require separate analysis. *These sections depart completely from the traditional and historical meaning of vagrancy.* In these sections the North Carolina General Assembly attributes the status of vagrant to gamblers, madams and prostitutes. Professional gamblers and keepers and inmates of bawdy houses may well be evil persons who ought to be controlled by the sanctions of the criminal law. *But to suppose, indeed, conclusively presume, that they are vagrants is irrational*

nonsense. One might as sensibly deem them to be Franciscan monks or murderers.... (emphasis added) 306 F. Supp. 64

In concluding, it should be pointed out that this Court has carefully considered all the reasons expressed by the City Prosecutor as to why Defendants' Motions should be denied. This Court, in fact, shares the views of the City Prosecutor in many respects. Set forth below are six areas where this Court fully concurs in the view of the City Prosecutor. Thereafter, this Court explains why none of these six can salvage Ordinance 36-86. The six areas where this Court shares the views of the Prosecutor are:

(1) This Court, as does the City Prosecutor, finds the operation of a "sex club" deplorable. It offends this Court's sense of morality. The operation of such a club could be a very detrimental influence on the residents of Maple Grove, particularly the young people.

(2) The Court fully recognizes the statement of the City Prosecutor that, in the absence of evidence to the contrary, there is a presumption of good faith in the enactment of municipal legislation. *5 McQuillin Municipal Corporation*, Sec. 1690, p. 266. In fact, this Court has no doubts about the good faith of the City Council in passing Ordinance 36-86.

(3) This Court concurs in the view of the City Prosecutor that "Even without a definition every person of ordinary intelligence knows what a 'brothel' is" and that it is reasonable to assume that the Defendants know what a "brothel" is. (Page 5 of brief of City Prosecutor)

(4) This Court concurs in the statement of the City Prosecutor that the Supreme Court of the United States in *Bowers v. Hardwick, et al*, supra, stated that it is unsupportable to claim that prior decisions of the Supreme Court of the United States "... stand for the proposition that any kind of private sexual conduct between consenting adults is constitutionally insulated from state proscriptions." (Page 6 of brief of City Prosecutor)

(5) This Court concurs in the statement of the City Prosecutor that the Supreme Court of the United States held in *Bowers v. Hardwick, et al*, supra, that the law does not confer a fundamental right on two male homosexuals to engage in sodomy, and the fact that this homosexual conduct occurs in the privacy of the home does not affect the result.

(6) This Court concurs in the view of the City Prosecutor that the operation of a "brothel" in a family oriented area where young children abide is a matter of serious and grave concern to the parents of these children. Generally speaking, this Court also concurs in the Prosecutor's view that "Such conduct may rightfully be proscribed by the city as injurious to the health, safety and welfare of its people." (Page 6 of brief of City Prosecutor)

As to (1) above, the fact that the operation of a "sex club" may be a very detrimental influence upon the residents of Maple Grove and the fact that this Court considers the operation of a "sex club" in the City of South Euclid deplorable cannot be dispositive of the issue here. The question before this Court is simply

whether Ordinance 36-86 is unconstitutional. Whether or not this City could pass legislation making the operation of a "sex club" on a residential street a criminal offense is not the core of the problem here. The question is whether Section 533.01(D) as written, is constitutional. This is a nation of laws, not men. No matter how the City Prosecutor, the City Council, the Mayor *or this Court* may feel about a certain type of activity, this cannot be dispositive of the Defendants' Motions. In concluding this discussion as to Item (1), this Court wants to emphasize that whether or not an ordinance making a "sex club" in a residential area illegal *could be* constitutionally valid has not even been considered by this Court. The question raised by Defendants' Motions is whether or not Ordinance 36-86 *as written* is unconstitutional. This Court has concluded that parts of this Ordinance are unconstitutional.

As to (2) above, there is no question in this Court's mind of the good faith of the City Council in enacting Ordinance 36-86. However, as previously explained, good faith or good intentions are not, in and of themselves, enough.

As to (3) above, this Court agrees with the City Prosecutor that individuals of ordinary intelligence, including these Defendants, know what a "brothel" is. The problem here, as previously explained, is that the definition of "brothel" in Section 533.01(L) is completely different from the well-accepted, long-standing meaning in the law of "brothel." In this Court's opinion, no one of ordinary or even superior intelligence would define "brothel" in the manner set forth in Section 533.01(L); therefore, the Prosecutor's argument that Section 533.01(L) is not vague and overbroad because any citizen of ordinary intelligence knows what a "brothel" is cannot

withstand analysis. Simply stated, it is true that ordinary citizens know what a "brothel" is, but this fact cannot save 533.01(L). This is so because no one could anticipate that "brothel" had the meaning attributed to it by Section 533.01(L), and Section 533.01(L) is written in a manner that cannot withstand constitutional analysis.

As to (4), (5) and (6) above, this Court fully accepts the statement of the Supreme Court in *Bowers v. Hardwick, et al*, supra that the State can prohibit sexual conduct, such as sodomy. In fact, as previously explained, this Court believes that a State or City can pass legislation making the operation of a "brothel" a crime and that this legislation, if properly drafted, is constitutional. The problem here, however, is that Section 533.01(L) has so significantly changed the meaning of "brothel", it cannot withstand constitutional analysis.

In addition to the matters discussed above, Defendants have enumerated a number of other arguments in support of their claim that Ordinance 36-86 is invalid; however, since this Court has determined that this Ordinance is constitutionally invalid due to vagueness and overbreadth and for other reasons, it is unnecessary to consider these other arguments.

There comes a time when a Court has the painful task of deciding a case in a manner which seems to condone activities which violate that Court's own personal conception of morality. But a Judge takes an oath to administer justice according to law. He cannot apply his own brand of justice or what he thinks the law should be, rather, he is obligated to apply the law as interpreted by the Supreme Court of the United States.

Here, this results in this Court declaring unconstitutional an Ordinance passed with very worthy motives. This Court is compelled to do so because that ordinance fails to satisfy constitutional standards. In so doing, however, this Court wants to re-emphasize that it has not considered the question of whether the operation of a "sex club" in a residential area under certain circumstances and operated in a certain manner might be prohibited by a law which met constitutional safeguards.* The only question that this Court has decided is that the Motions of the Defendants to Dismiss the Complaints must be sustained because parts of Ordinance 36-86 are unconstitutional.

Respectfully submitted,

/s/ JEROME A. KLEIN
Judge Jerome A. Klein

Dated: June 26, 1987

* This Court is not, however, aware of any law of any City or State where the operation of a "sex club", in and of itself, has been made a crime.

APPENDIX D

City of South Euclid, Ohio
Ordinance No. 36-86

CITY OF SOUTH EUCLID, OHIO

October 14, 1986

ORDINANCE NO. 36-86
INTRODUCED BY: _____
REQUESTED BY: Mayor

AN ORDINANCE

AN ORDINANCE TO AMEND SECTION 666.01, DEFINITIONS, BY ADDING NEW SUBSECTIONS "l" and "m"; AND TO AMEND SECTION 666.07 PROCURING, AS CONTAINED IN CHAPTER 666, SEX RELATED OFFENSES, OF PART SIX-GENERAL OFFENSES CODE OF THE CODIFIED ORDINANCES OF THE CITY OF SOUTH EUCLID; AND DECLARING AN EMERGENCY.

BE IT ORDAINED by the Council of the City of South Euclid, Ohio:

Section 1. That Section 666.01 Definitions, as contained in Chapter 666, Sex Related Offenses, of Part Six-General Offenses Code of the Codified Ordinances of the City of South Euclid, Ohio be and the same is hereby amended by adding, thereto new subsections "l" and "m" to read as follows:

"666.01 DEFINITIONS.

"l" "Brothel" means any place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purposes of engaging in group sex, sexual conduct and sexual acts, as herein defined, lewdness or acts of gross and wanton indecency in sexual relations or other sexual

activity which corrupts or tends to corrupt the morals of persons in the community.

"Lewdness" means sexual conduct of relations of such gross indecency and so notorious as to corrupt community morals."

Section 2. That Section 666.07, Procuring, as contained in Chapter 666, Sex Related Offenses, of Part Six-General Offenses Code of the Codified Ordinances of the City of South Euclid, Ohio be and the same is hereby amended to read as follows:

"666.07 BROTHEL; PATRONIZING: PROCURING: PROSTITUTION.

(a) No person, knowingly, and for gain, shall do either of the following:

(1) Entice or solicit another to patronize a prostitute

(2) Procure a prostitute for another to patronize, or take or direct another at his or her request to any place for the purpose of patronizing a prostitute.

(b) No person, having authority or responsibility over the use of premises shall knowingly permit such premises to be used for the purpose of engaging in sexual activity for hire.

(c) NO PERSON, ORGANIZATION, CLUB OR ASSOCIATION SHALL OWN, OPERATE, MAINTAIN OR MANAGE A BROTHEL OR SOLICIT, INVITE OR ENTICE ANOTHER TO PATRONIZE A BROTHEL OR TO ENGAGE IN ACTS OF LEWDNESS OR SEXUAL CONDUCT AS HEREIN DEFINED.

(d) WHOEVER VIOLATES THIS SECTION IS GUILTY OF A MISDEMEANOR OF THE FIRST DEGREE AND SHALL BE PUNISHED AS PROVIDED IN SECTION 698.02.

Section 3. That existing Section 666.07 Procuring as contained in Chapter 666, Sex Related Offenses, of Part Six-General Offenses Code of the Codified Ordinances of the City of South Euclid, be and the same is hereby expressly repealed.

Section 4. That this Ordinance is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, safety and welfare of the City, and for the further reason that same is necessary in the current operation of the Police Department. Wherefore, this Ordinance shall take effect upon passage and approval.

Passed this 14th day of October, 1986.

JACK J. CLIFFORD
Jack J. Clifford
President of Council

Approved: 10/14/86
ARNOLD G. D'AMICO, Mayor

Attest:

CELESTE DICILLO
Clerk of Council

I, Celeste DiCillo, Clerk of Council of the City of South Euclid, Ohio, do hereby certify that the foregoing Ordinance No. 36-86 is an exact copy of the ordinance passed on the 14th day of October, 1986, at a regular meeting of Council.

CELESTE DICILLO
Clerk of Council

Supreme Court, U.S.
FILED
JUL 3 1990
JOSEPH F. SPANIOL, JR.
CLERK

No. 89-1888

In The

Supreme Court of the United States

October Term, 1989

CITY OF SOUTH EUCLID,

Petitioner,

vs.

DAIVA RICHARDSON and RONNIE RICHARDSON,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Ohio

BRIEF FOR RESPONDENTS IN OPPOSITION

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QUESTION PRESENTED

Whether South Euclid, Ohio Ordinance 36-86, under which Respondents were criminally prosecuted, is unconstitutionally vague and overbroad under the First and Fourteenth Amendments to the United States Constitution, as the Supreme Court of Ohio, the Ohio Court of Appeals and the South Euclid Municipal Court all agreed.

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No. 89-1888

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

CITY OF SOUTH EUCLID,

Petitioner,

vs.

DAIVA RICHARDSON and RONNIE RICHARDSON,

Respondents.

BRIEF FOR RESPONDENTS IN OPPOSITION

Respondents Daiva and Ronnie Richardson respectfully urge that the Petition for Writ of Certiorari seeking review of the judgment of the Supreme Court of Ohio, be denied.

THE OPINIONS OF THE COURTS BELOW AND THE CONSTITUTIONAL, STATUTORY AND ORDINANCE PROVISIONS INVOLVED

In addition to the opinions of the courts below and the constitutional, statutory and ordinance provisions cited and set forth in the Petition for Writ ("Petition") which Respondents hereby adopt for purposes of citation, the following statute and ordinance provisions are involved in this case: Ohio Revised Code § 2907.01(A), Ohio Revised Code § 2907.07(B), South Euclid Codified Ordinance § 533.01, South Euclid Codified Ordinance § 533.08, and South Euclid Codified Ordinance § 533.09.

The relevant text of the foregoing additional citations is fully set forth in Respondents' Appendix attached hereto.

STATEMENT OF THE CASE

On October 14, 1986, the City Council of South Euclid, Ohio adopted as an emergency measure Ordinance 36-86. This ordinance has two principal components. First, it creates a first-degree misdemeanor, unique to South Euclid and bearing no relationship to any provisions existing in the state criminal code. This liability provision was passed as an amendment to an existing South Euclid ordinance relating to prostitution and procuring, and provides in full:

> (c) No person, organization, club or association shall own, operate, maintain or manage a brothel or solicit, invite or entice another to patronize a brothel or to engage in acts of lewdness or sexual conduct as herein defined.
>
> (d) Whoever violates this section is guilty of a misdemeanor of the first degree and shall be punished as provided in section 698.02. Petition App.

at A50-A51[1/]

Thus, this liability provision prohibits, among other things, owning, operating, maintaining or managing a "brothel." It should also be emphasized that this ordinance defines the most serious offense within the power of South Euclid to enact - a first degree misdemeanor. A person convicted under this ordinance may be imprisoned for a period of six months and fined $1,000.00.

Second, Ordinance 36-86 has a definitional component which sets forth South Euclid's new definitions of the terms "brothel" and "lewdness," two terms which are incorporated into the criminal

---

[1/] The liability portion of Ordinance 36-86 amended § 666.07 of the South Euclid Codified Ordinances, which was subsequently renumbered as § 533.08. Opinion of Trial Court; Petition App. at A-33.

liability provision.[2/] The language chosen by Petitioner to mark the boundaries of this new offense is remarkable, not only because of its exquisitely vague and clumsy wording, but because it purports to regulate the most intimate and private aspects of the lives of the citizenry. These definitions provide:

> "l" "Brothel" means any place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purposes of engaging in group sex, sexual conduct and sexual acts, as herein defined, lewdness or acts of gross and wanton indecency in sexual relations or other sexual activity which corrupts or tends to corrupt the morals of persons in the community.
>
> "m" "Lewdness" means sexual conduct or relations of such gross indecency and so

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[2/] This portion of Ordinance No. 36-86 amended section 666.01 of the South Euclid Codified Ordinances, which was subsequently renumbered as § 533.01. Opinion of Trial Court; Petition Appendix at A-33.

> notorious as to corrupt community morals. Petition App. at A-49-A50.

Thus, although the liability portion of Ordinance 36-86 amended the prostitution ordinance (See Respondents' App. at A3), Petitioner's definition of "brothel" does not conform to the common understanding of the meaning of that term - that is, a "house of prostitution," where a person can receive sexual favors with a prostitute for a fee. Indeed, Petitioner's definition of "brothel" unmistakably constitutes a significant departure from the commonly understood meaning of that word, since the definition does not require that money change hands.

Further, just a cursory glance at these provisions of the ordinance makes it readily apparent that this ordinance cannot be characterized, as the Petitioner argues, simply as a prohibi-

tion against "group sex."[3/] Not only does the language of the ordinance demonstrate that prohibiting "group sex" is not the "core" of Ordinance 36-86, however, but the legislative history of this ordinance soundly refutes Petitioner's present suggestion that the intent behind adopting Ordinance 36-86 was to regulate "group sex." The one document admitted into evidence relating to the purpose for adopting 36-86, "Defendant's Exhibit A," is a verbatim record of the October 14, 1986 adoption of the Ordinance, and provides in full:

3/ In its effort to obtain this Court's review, Petitioner goes outside of the record making erroneous factual assertions about Respondents' "conduct" and misconstruing the rulings of the courts below. Accordingly, pursuant to Rule 15.1, Respondents point out such misstatements where appropriate.

Introduced by Clifford Ordinance 36-86

ORDINANCE

AN ORDINANCE TO AMEND SECTION 666.01, DEFINITIONS, BY ADDING NEW SUBSECTIONS "l" AND "M"; AND TO AMEND SECTION 666.07 PROCURING, AS CONTAINED IN CHAPTER 666, SEX RELATED OFFENSES, OF PART SIX-GENERAL OFFENSES CODE OF THE CODIFIED ORDINANCES OF THE CITY OF SOUTH EUCLID; AND DECLARING AN EMERGENCY.

Moved by Clifford, seconded by DiCillo that Ordinance 36-86 be passed.

Mr. Clifford - "You will recall on your original agenda for this evening, that we had Ordinance 33-86 which is an ordinance providing for indemnification of city officials and declaring an emergency. The reason I mention this, that, this ordinance is very similar and that as part of his duty, and I don't know where he finds the time, but the Law Director has been taking some time at least, to review many portions and sections of our codified ordinances and their definitions and various other things, and this is similar to 33-86 in that the definitions involved were felt to be inadequate and so the Law Director has provided us with Ordinance 36-86. Any comments?"

Law Director DeMarco - "No, this is just as you pointed out, part of my continuing effort to bring up our 'archaic' ordinances. Some of them go back to 1928 which just reading them makes me cringe, because they are not up to date and as you say, from time to time when I run across some of these sections of our code that require attention, I prepare ordinances such as this, and I just want to bring us up to date with the State Code as a matter of fact, in connection with matters of this kind."

Mr. Clifford - "Thank you Mr. Law Director, any other comments? If not I'll call the roll."

Ayes: Cady, DiCillo, Kocevar, Stein, Ungar, Clifford
Nays: None

Ordinance 36-86 has passed.

This contemporaneous legislative history establishes that the City Council considered Ordinance 36-86 to be necessary because of perceived inadequate definitions of a predecessor ordinance, and that Ordinance 36-86 constituted an attempt "to bring [South Euclid] up to date with the State Code," despite the

fact that it bears no resemblance to any provision of the Ohio Revised Code.

Following the adoption of this ordinance, Respondents, a married couple residing in South Euclid, were each charged by complaint on December 30, 1986, as follows:

> Complainant being duly sworn states that Ronnie [and Daiva] Richardson at City of South Euclid Cuyahoga, County, Ohio during the period of time from *** October 16, 1986 through and including *** December 20, 1986, defendant[s] did own, operate, maintain or manage a brothel as defined in Section 533.01(L) (formerly Section 666.01 as amended by Ordinance 36-86) of the Codified Ordinances of the City of South Euclid at 1552 Maplegrove Road, South Euclid, Ohio in violation of Section 533.08(C) (formerly Section 666.07 as amended by Ordinance 36-86) of the Codified Ordinances of the City of South Euclid and against the peace and dignity of the City of South Euclid, Ohio.

See Opinion of Trial Court; Petition App. at A30-A31 (emphasis added). Accordingly, Respondents were charged under Ordinance

36-86 with owning, operating, maintaining or managing a "brothel," where their private home was alleged to constitute a "brothel." Notably, the complaints did not charge Respondents with operating their home to conduct "group sex parties" - in fact, the term "group sex" does not appear once in the complaints - and no bill of particulars was filed by Petitioner. Accordingly, contrary to Petitioner's assertions before this Court, Respondents were never charged with engaging in "group sex," nor is it established anywhere in the trial record that "group sex" was the conduct with which Respondents were charged. Rather, the conduct with which Respondents were charged was the generic crime of operating a "brothel."

Respondents filed motions to dismiss the criminal charges arguing, among other things, that Ordinance 36-86

was blatantly, pervasively and substantially vague and overbroad, and thus was unconstitutional on its face.[4/]

The trial court issued a thoughtful, lengthy opinion striking down the ordinance as unconstitutionally vague and overbroad. Applying the controlling constitutional principles of long-

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[4/] Petitioner never argued before the trial court that this was an ordinance which, at its core, prohibits "group sex," that other portions of the ordinance should be ignored since the "group sex" prohibition was not vague as to Respondents, that the ordinance was never intended to reach, and would not be applied against, married couples engaged in constitutionally protected activity, nor did Petitioner urge a limiting construction of the ordinance. Accordingly, the record is absolutely barren of any factual support for Petitioner's present assertion that "had the trial been allowed to proceed, the evidence would have shown Respondents were operating a facility for group sex by utilizing their South Euclid residence for regularly scheduled group sex parties, charging participants $25 per couple to attend." Petition at 7.

standing, the trial court concluded that the ordinance fails to apprise citizens as to what activities are punishable, see, e.g., Opinion of Trial Court; Petition App. at A37, A39, A42, and encompasses "on its face activities which are, by modern standards, normally innocent so as to be constitutionally protected." Id. at A34; see also id. at A39-A42.

Petitioner appealed the trial court's decision to the Ohio Court of Appeals for the Eighth District which unanimously upheld the trial court's opinion striking down Ordinance 36-86 as unconstitutionally vague and overbroad. Relying on precedent of this Court, the court of appeals concluded that Ordinance 36-86 fails to warn citizens of what conduct is prohibited, fails to provide discernible standards for enforcement, and threatens to regulate and punish

constitutionally protected activity.[5/]

On appeal to the Supreme Court of Ohio, a majority of the court determined that Ordinance 36-86 is unconstitutionally vague and overbroad and adopted the opinion of the court of

---

[5/] Contrary to Petitioner's assertions here, at no time did the court of appeals concede, recognize, agree or find that the phrase "group sex" had a commonly understood meaning or that the ordinance was not vague in all its applications (see Petition at 8). Rather, the clear import of the court of appeals' decision is that whatever common meaning the term "group sex" may have, that meaning was irretrievably lost in the context of the ordinance (Opinion of Court of Appeals; Petition App. at A-25). Nor did the court of appeals acknowledge, as Petitioner suggests, that the ordinance was not intended to regulate private sexual relations between husband and wife (See Petition at 9). Rather, in this regard, the court of appeals recognized that the assumption that Petitioner did not intend to regulate sexual activities between married heterosexual couples, would make it impossible to determine what Petitioner did intend to regulate. Opinion of Court of Appeals; Petition App. at A-25.

appeals over the dissent of three justices, all of whom nevertheless agreed that the ordinance "is not a model of clarity." Dissenting Opinion of Supreme Court of Ohio; Petition App. at A12.

Petitioner now seeks review in this Court, arguing that the Supreme Court of Ohio, the Ohio Court of Appeals and the South Euclid Municipal Court all failed to apply proper legal standards in striking down the Ordinance, and that under proper standards, the Ordinance is constitutional.

Thus, Petitioner claims that this case warrants "this Court's immediate review because it presents a needed opportunity to resolve a conflict which has arisen concerning the impact of this Court's decision in Kolender v. Lawson, 461 U.S. 352 (1983) on a facial vagueness challenge and a conflict between the Supreme Court of Ohio and other courts

concerning the proper test to apply in an overbreadth challenge." Petition at 12. No such opportunity, however, is presented by this case.

For, not only is Petitioner's argument premised on factual assertions which find no support in the record of this case, but as Petitioner must concede, the Supreme Court of Ohio did not rely on this Court's decision in Kolender, let alone find that the Ordinance was not vague in all its applications. Nor did Supreme Court of Ohio find that the Ordinance did not pose a real and substantial threat to protected activity.

Rather, after thorough briefing of the issues and oral arguments, the Supreme Court of Ohio rejected the very arguments made by Petitioner here and like the trial court and the court of appeals reached the only conclusion

possible -- Ordinance 36-86 is unconstitutionally vague and overbroad under any applicable standard.

REASONS FOR DENYING THE WRIT

NO IMPORTANT QUESTION IS PRESENTED BY THIS CASE BECAUSE ORDINANCE 36-86 SUFFERS FROM SUCH PERVASIVE AND INCURABLE VAGUENESS AND SUCH SUBSTANTIAL AND REAL OVERBREADTH AS TO RENDER IT UNCONSTITUTIONAL UNDER ANY APPLICABLE LEGAL STANDARD

A. Applicable Legal Standards

It has long been established that a statute, and especially a criminal statute, is unconstitutional on its face if its provisions are so vague and imprecise that persons of ordinary intelligence must guess at its meaning and differ as to its application. Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972); Coates v. City of Cincinnati, 402 U.S. 611, 614 (1971).

This constitutional protection against vague laws recognizes that a country governed by a rule of law rather than a rule of men requires that the average person be given "a reasonable opportunity to know what is prohibited, so that he may act accordingly." Grayned, 408 U.S. at 108.

In addition to requiring that citizens be notified as to what conduct is prohibited, the void-for-vagueness doctrine demands that precise standards be enacted to aid police, prosecutors, judges and juries in applying the law so as to prevent "arbitrary and erratic arrests and convictions." Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972). See also Kolender v. Lawson, 461 U.S. 352, 357 (1983); Colautti v. Franklin, 439 U.S. 379, 390 (1979); Giaccio v. Pennsylvania, 382 U.S. 399, 402-03 (1966).

And, as this Court has recognized, "[w]here a statute imposes criminal penalties the standard of certainty is higher." Kolender, 461 U.S. at 398 n.8. For, where there is the possibility of criminal punishment, ambiguities must be "resolved in favor of the defendant." United States v. Bass, 404 U.S. 336, 348 (1971)).

The doctrine of overbreadth, although related to the void-for-vagueness doctrine, focuses on the potential reach of a statute rather than on its precision. Even if a statute does not suffer from lack of specificity or imprecision, it will be declared unconstitutional on its face if its sweep is unnecessarily broad and if it threatens to ensnare within its web either constitutionally protected activity or otherwise legitimate and innocent conduct. Grayned, 408 U.S. at 114; Zwickler v.

Koota, 389 U.S. 241, 250 (1967); Coates, 402 U.S. at 614.

Petitioner asserts that the state courts erred in failing to review Ordinance 36-86 under the "facts" in this particular case, and for failing to make an express finding that the ordinance's overbreadth is "substantial" or "real." Petitioner maintains that Ordinance 36-86 is unambiguous, and, at its core, it regulates "group sex." In essence, Petitioner suggests that the courts below twisted this ordinance beyond recognition, and then resorted to creating strawmen to declare the Ordinance unconstitutional.

Tested by this Court's precedent, however, it is abundantly clear that the state courts were correct in declaring Ordinance 36-86 unconstitutional, since under any set of imagined facts, Ordinance 36-86 suffers fatally

from imprecision and a total lack of coherency, its sweep is dangerously, substantially and impermissibly overbroad and it delegates basic policy decisions to police officers, judges and juries. Indeed, the list of the Ordinance's defects is virtually endless.

B. The Definition Of "Brothel" And Its Role In Establishing Criminal Liability.

The criminal liability provision in Ordinance 36-86 establishes a new first-degree misdemeanor carrying a potential $1,000 fine plus a jail term of up to six months. This provision, under which Respondents were charged, provides in full:

> No person, organization, club or association shall own, operate, maintain or manage a brothel or solicit, invite or entice another to patronize a brothel or to engage in acts of lewdness or sexual conduct as herein defined.

While this provision has vagueness and

overbreadth problems apparent on its face, as discussed below, the vagueness and overbreadth implications are most prominent when analyzed in light of the provision's incorporation of certain key words. In particular, analysis must begin with the term "brothel," since that is the functioning keystone of the entire ordinance.

1. The Vagueness And Overbreadth Of The Definition Of "Brothel," Taken As A Whole.

"Brothel" is defined in Ordinance No. 36-86 as follows:

> "Brothel" means any place, house or dwelling maintained and/or operated by any person, organization, club or association, for the purposes of engaging in group sex, sexual conduct and sexual acts, as herein defined, lewdness or acts of gross and wanton indecency in sexual relations or other sexual activity which corrupts or tends to corrupt the morals of persons in the community.

Entirely apart from the vagueness of the specific words and

phrases used in this definition, which will be discussed below, the definition in its totality does such violence to accepted rules of grammar and usage as to render the ordinance indecipherable.

First - Structural and Grammatical Defects.

In the first place, "brothel" is defined as a place, house or dwelling operated for certain "purposes." Certainly, South Euclid City Council consciously elected to use the plural "purposes" rather than the singular "purpose." However, the language which follows the word "purposes" identifies at least six separate types of activity, some of which are connected by the conjunctive "and" and others of which are connected by the disjunctive "or." Thus, the definition reads: "operated ... for the purposes of engaging in group sex, sexual conduct and sexual acts ...,

lewdness or acts of gross and wanton indecency in sexual relations or other sexual activity ...." (Emphasis added). Accordingly, one of the first issues which arises upon reading the Ordinance is what conduct or type of activity, or combination of types of activity, meets this definition.

However, a citizen wishing to conform his conduct to the requirements of the law would be unable to discern from this provision what is lawful and what is unlawful, and when certain acts would transform a building or house into a "brothel." The use of the conjunctive "and" in the phrase "group sex, sexual conduct and sexual acts" suggests that there must be a purpose to engage in all three forms of conduct before the Ordinance's prohibitions are triggered. However, the inclusion of the disjunctive "or" twice in the phrase "lewdness, or

acts of gross and wanton indecency in sexual relations or other sexual activity ..." suggests that any one of those three forms of conduct would suffice to trigger the prohibitions of the Ordinance.

This latter suggestion, however, cannot be reconciled with the use of the plural form of "purposes" which informs the citizen that a purpose to engage in more than one of the enumerated forms of conduct is required.

The use of the second "or," found in the last phrase, simply compounds the interpretation problem, since it is not clear what this word is separating. For example, does the use of this second "or" suggest that "sexual activity" in addition to "sexual relations" is modified by the preceding phrase "acts of gross and wanton indecency" - i.e., "acts of gross and wanton indecency in sexual relations or [acts of gross and

wanton indecency in] other sexual activity." In the alternative, does the "or" merely serve to separate two independent activities each of which is proscribed in private homes - i.e., "for purposes of engaging in ... lewdness or ... sexual activity ...?" Again, this is an unanswered and unanswerable question.

In fact, the grammar has rendered interpretation an impossibility and has made guess work or calculating probabilities a necessity. Even when considered in light of Petitioner's inflammatory "factual" assertions, the Ordinance is as vividly vague under that hypothetical set of facts as any other set of facts, since the Ordinance's structure prevents a citizen from knowing with any degree of certainty what acts are prohibited. Addressing this very defect, the trial court commented, "if an ordinance is written in a manner wherein

the interconnection and relationship of the various phrases and portions thereof are so difficult to ascertain, how is a private citizen to be apprised what activities are prohibited and punishable by this Ordinance?" Opinion of Trial Court; Petitioner's App. at A37. On its face, therefore, Ordinance 36-86 is vague under any set of circumstances.

Second - The Missing Definitions.

The Ordinance, in one of its phrases, promises that it will define certain terms used therein. Thus, one part of the definition of "brothel" reads as follows: "for the purposes of engaging in group sex, sexual conduct and sexual acts, as herein defined ...." (Emphasis added). However, that promise goes unfulfilled. While a citizen can find a definition of "sexual conduct" in section 533.01(a), a section of the South Euclid Codified Ordinances which was on

the books before the adoption of Ordinance 36-86,[6] the citizen will search in vain for a definition of either "group sex" or "sexual acts."[7]

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[6] "Sexual conduct" includes "vaginal intercourse between a male and female, and anal intercourse, fellatio and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse." See South Euclid Codified Ordinances § 533.01(a); Respondents' App. at A2. This definition precisely parallels the Ohio Revised Code definition of "sexual conduct." See Ohio Rev. Code § 2907.01(A); Respondents' App. at and A1.

[7] The phrase "sexual acts" is not the equivalent of "sexual activity," a term defined in § 533.01(c) of the South Euclid Codified Ordinances. First, both the phrases "sexual acts" and "sexual activity" are used in the definition of "brothel." Second, since the Codified Ordinances draw fine distinctions between "sexual conduct," "sexual contact" and "sexual activity," see South Euclid Codified Ordinances § 533.01(a), (b), (c); Respondents' App. at A2, it cannot be assumed that "sexual acts" was to be used interchangeably with any of these other terms. See Opinion of Trial Court; Petition App. at A38.

What is a citizen who wants to conform his conduct to the law to think when faced with an ordinance that falsely represents to him that certain terms used in the ordinance have special definitions that can be found in the ordinance? How is he to discern the meaning of terms which he is told are defined in the ordinance when, to the contrary, no such definitions are set forth in the ordinance? Such an ordinance simply cannot be squared with the fundamental principle that due process requires penal laws to give a citizen fair warning of its prohibitions. In fact, as the trial court, court of appeals and Supreme Court of Ohio recognized, it is difficult to conceive of a more overt violation of the void-for-vagueness doctrine. Opinion of Trial Court; Petition App. at A38; Opinion of Court of Appeals; Petition App. at A24-A25; Opinion of Supreme Court

of Ohio; Petition App. at A10.

Petitioner argues, however, that the term "group sex" is not vague because it has a common meaning understood by the ordinary person. As an initial matter, Petitioner is simply wrong to suggest that the term "group sex" is self-defining, and the hypothetical set of facts which Petitioner asserts totally outside the record is ideal for illustrating this point.[8/]

Assume, as Petitioner improperly suggests, that Respondents intend

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8/ Moreover, it is disingenuous for Petitioner to suggest that the Supreme Court of Ohio agreed that the term "group sex" was not vague in the context of Ordinance 36-86 (Petition at 9 and 16). Yes, the court did assume for the sake of argument that "group sex" may have a commonly understood meaning, but its opinion clearly concludes that within the context of the ordinance that assumed meaning is irretrievably lost. Opinion of Supreme Court of Ohio; Petition App. at A11.

to conduct sex parties at their South Euclid residence. To determine whether this kind of party is lawful, and to determine how they might conform their conduct to the law, Respondents consult Ordinance 36-86, particularly focusing on the term "group sex." Does "group sex" mean that there has to be at least three people engaged in sex among each other at the same time? If that is the case, would Respondents be shielded from criminal liability if the guests at their party were instructed that they were free to engage in sex with anyone else at the party, as long as there was never more than two people engaging in sex together - i.e., that there could be no "three-somes?" Or, does "group sex" have a different meaning, where Respondents will have exposed themselves to criminal liability if at least two couples, as "twosomes," engage in sexual relations at

the same time? If criminal liability is triggered by this latter example, could Respondents avoid criminal liability by instructing their guests that no couple could have sexual relations in the presence of a third person, but instead must retreat to a private bedroom?

The fact that the term "group sex" is used does not answer those questions. Rather, it is evident that "group sex" is not a precise and unambiguous term and may have different meanings to different people, even when analyzed under Petitioner's own hypothetical set of facts.

More importantly, as the state courts recognized, even if "group sex" did have a commonly understood meaning, Ordinance 36-86 promises that "group sex" has a specific, key definition in this context. However, the promise to provide a special definition goes unfulfilled.

(See e.g., Opinion of the Supreme Court of Ohio; Petition App. at A10 and A11). Accordingly, even if "group sex" is self-defining, which Respondents dispute, Ordinance 36-86 nonetheless is unconstitutionally vague since it represents to South Euclid citizens that, in this context, "group sex" is not self-defining.

Third - The Corruption Of Community Morals Clause.

The concluding language in the definition of "brothel" is the phrase "which corrupts or tends to corrupt the morals of persons in the community." As will be shown below, this corruption-of-community-morals clause alone is such an utterly vague and subjective standard as to render the entire Ordinance unconstitutional. But even apart from this, it is impossible to ascertain what this clause modifies in the disjointed and

clumsy definition of "brothel." Does it modify all six forms of activity set forth in the definition? Or does it modify only the last three forms of activity identified in the Ordinance? Or, for that matter, does it only modify the phrase "or other sexual activity" which immediately precedes the clause in question?

In other words, is it only that type of group sex, sexual conduct, sexual acts, lewdness, acts of gross and wanton indecency and other sexual activity "which corrupts or tends to corrupt the morals of persons in the community" that is prohibited by the ordinance? Or does the moral-corruption clause modify only "sexual activity," the phrase which immediately precedes the clause, so that the other activities set forth in the ordinance such as "sexual conduct" and "sexual acts" are banned even if not of a

type "which corrupts or tends to corrupt the morals of persons in the community?"

The trial court tentatively concluded that this latter interpretation was most plausible. See Opinion of Trial Court; Petition App. at A37-A38. If the trial court's interpretation of this aspect of the Ordinance is correct, and the Ordinance bans "sexual acts" and "sexual conduct" even if not of the type which corrupts or tends to corrupt the morals of persons in the community, then the Ordinance is unquestionably overbroad, because its prohibition would extend to "activities which by modern standards are normally innocent." Papachristou, supra, 405 U.S. at 164. See also South Euclid Codified Ordinances § 533.01(a), (b), (c); Respondents' App. at A2.

The problem is that it is impossible to decipher how and where the

moral corruption clause fits into the definition of "brothel" and what that clause does and does not modify. Instead, the citizen is set adrift to speculate and guess what the Ordinance means. And the potential price of a wrong guess is six months in jail and a $1,000 fine.

Petitioner nevertheless argues that the Supreme Court of Ohio recognized that the Ordinance was never intended to reach married couples engaging in protected activity (Petition at 19). The fallacy of Petitioner's assertion is highlighted by the following passage of the Supreme Court of Ohio:

> [I]f the plaintiff-appellant City of South Euclid did not intend to regulate sexual activities between married heterosexual couples, which we assume it did not, then a reading of the entire definition of "brothel" in Ordinance 36-86 makes it virtually impossible to determine what activities plaintiff-appellant did intend to regulate.

Opinion of Supreme Court of Ohio (emphasis added); Petition App. at A11. Rather than making a finding supportive of Petitioner's argument, clearly the court found that the limiting construction advanced by Petitioner could not cure the Ordinance's unconstitutionality.

In summary, the definition of "brothel" contained in Ordinance 36-86 is so structurally flawed and so grammatically improper that it is nothing more than gibberish. The Ordinance is simply unintelligible, fails to give fair warning of its prohibitions and invites arbitrary, uneven and discriminatory enforcement by policemen, prosecutors, judges and juries. Moreover, since the Ordinance casts a wide net, encompassing constitutionally protected activity, its overbreadth is "substantial" and "real."

2. The Vagueness And Overbreadth Of Specific Key Phrases Used In The Definitions Contained In The Ordinance.

Entirely apart from the structural and grammatical defects in the Ordinance already discussed, several phrases in the Ordinance which are central to its meaning are impossibly vague and overbroad. Thus the definition of "brothel" refers to sexual activity "which corrupts or tends to corrupt the morals of persons in the community."9/ The definition of brothel further refers to "acts of gross and wanton indecency in sexual relations." Finally, the definition of "brothel" also refers to "lewdness," which is separately defined as "sexual conduct or relations of such

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9/ As earlier noted, it is impossible to tell which phrase or phrases this clause modifies.

gross indecency and so notorious as to corrupt community morals."[10/]

These phrases are so nebulous and so loosely worded as to provide no objective standard whatsoever to judge when a citizen has crossed the line separating lawful sexual activity from that which will subject him or her to criminal prosecution and punishment under the ordinance.

Are husbands and wives in South Euclid at risk of criminal prosecution when they engage in sexual intercourse in the privacy of their own homes in some position other than the missionary position? Will husbands and wives in the City of South Euclid go to jail if they engage in oral sex in their bedrooms? Would Petitioner regard that to be an act

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10/ "Lewdness" is incorporated into the liability portion of Ordinance 36-86 as well.

of gross and wanton indecency, or an act which tends to corrupt the morals of persons in the community?

Is it a crime in South Euclid for a woman to use a vibrator for sexual pleasure in the privacy of her own home? Is masturbation in one's own home a lewd act and, therefore, criminal conduct in South Euclid?

Does every unmarrried couple who chooses to live together in South Euclid face six months in jail on the ground that their sexual activity will corrupt the morals of the community? Does the roster of criminals in the City of South Euclid include every couple who engages in premarital sex?

The answers to these questions cannot be found in the Ordinance. By its clumsy and open-ended definition of "brothel," Petitioner completely abdicated its important responsibility of

supplying an objective and ascertainable standards of guilt designed to result in even-handed enforcement of the law. As the state courts agreed, these phrases impermissibly delegate "basic policy matters to policemen, judges and juries for resolution on an ad hoc and subjective basis." Grayned v. City of Rockford, 408 U.S. at 108-09. See also Kolender, 461 U.S. at 357-61. Indeed, it would be an understatement to conclude that persons of "common intelligence must necessarily guess at its meaning and differ as to its application." Connally v. General Constr. Co., 269 U.S. at 391.[11]

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[11] The utter vagueness of Ordinance 36-86 is even more stark when one considers the dilemma a trial court would face in attempting to construct a jury charge for all the various nuances of this ordinance.

Further, because of its potential application, at the whim of a policeman, a prosecutor or a jury, to constitutionally protected, innocent sexual conduct between husbands and wives in the privacy of their homes, Ordinance 36-86 is also substantially and unconstitutionally overbroad.

3. The Vagueness And Overbreadth Of The Phrase "Maintain and/or Operate ... For The Purposes Of."

Ordinance 36-86 defines "brothel" as a house or dwelling "maintained and/or operated" for particular purposes, but fails to define what is meant by this phrase. As a result, serious vagueness and overbreadth concerns are presented. Even were a citizen able to determine what types of activity are encompassed by this ordinance, it is impossible for an ordinary

person to know what percentage of time the listed activities must occur on the premises in order for the premises to be "maintained and/or operated ... for the purposes" of such activities.

Under Ordinance 36-86, is a house or dwelling maintained and/or operated for a purpose or purposes if the prohibited activities occur on the premises a mere .01% of the time? Or, does this definition require that 50% or 100% of the activity occurring on the premises be prohibited activity? The Ordinance does not answer this question. Further, it is not evident how essential the activity or combination of activities must be to the premises' existence in order for it to constitute a "brothel," as opposed to a private residence or office. Does the activity, or combination of activities, have to constitute a primary purpose for which

the home is maintained, or does an incidental purpose satisfy the Ordinance? For that matter, must the purpose be objectively manifested or is a subjective purpose alone satisfactory? For instance, if an individual rents an apartment for the sole purpose of engaging in one form of prohibited conduct listed in the Ordinance, is this apartment a "brothel" even though no prohibited conduct ever takes place on the premises?

Petitioner ignored this serious defect in the ordinance in the state courts, and continues to skirt this issue before this Court. Rather, Petitioner simply asserts that Ordinance 36-86 prohibits the use of a residence for the purpose to engage in "group sex". Petition at 15 (emphasis added). However, the "use" of a building is certainly not equivalent to "maintaining" or

"operating" a building for a particular purpose. And, in any event, even if the Ordinance merely prohibits the "use" of a building for a purpose, it still must be determined to what extent the building must be "used" for that purpose before criminal liability is triggered.

To illustrate the substantial vagueness implications resulting from this total lack of definition, consider applying this ordinance to a married couple, such as Respondents, who purchase a house in South Euclid and proceed to establish their residence there. The couple sleeps there, eats there, bathes there, watches television there and exercises there. In other words, this married couple utilizes or "uses" their residence for all the activities generally associated with private homes. In addition, assume, as Petitioner asserts outside the record, that the couple

engages in some form of "group sex," whatever that term means, twice a month at their house.

While it is obvious that "group sex" cannot be characterized as a primary purpose for maintaining the residence in light of the many other activities occurring on the premises, the Ordinance provides no guidance as to whether this couple has exposed itself to potential criminal liability. It is not clear, for instance, whether the Ordinance instantaneously transforms this private home into a "brothel" when the couple engages in "group sex" once, twice or ten times; or, whether their residence becomes a "brothel" the moment other people are invited to their home to engage in "group sex," but before any prohibited activity occurs; or conversely, whether the married couple is shielded from criminal liability simply because the prohibited

activity does not constitute the couple's main purpose for maintaining the home. By failing to specify objective guidelines for determining when a private home is subject to this transformation process, the Ordinance is unconstitutionally vague. Kolender, 461 U.S. at 357-61; Coates, 402 U.S. at 614; Papachristou, 405 U.S. at 162; and, inasmuch as the Ordinance purports to create "brothels" out of private residences, thereby criminalizing innocent activity, the Ordinance is unconstitutionally overbroad. Grayned, 408 U.S. at 114.

C. Additional Vagueness And Overbreadth Problems Of The Liability Portion of Ordinance 36-86.

1. The Lack Of A Scienter Requirement.

One of the most remarkable aspects of this ordinance is that it

contains no scienter requirement since it fails to require any guilty knowledge or purpose. Specifically, the criminal liability portion of the Ordinance provides:

> No person, organization, club or association shall own, operate, maintain or manage a brothel or solicit, invite or entice another to patronize a brothel or to engage in acts of lewdness or sexual conduct as herein defined.

Thus, even were it possible to decipher the Ordinance's definition of "brothel," criminal liability can be imposed on the owner of the real estate upon which the "brothel" is situated, even though the owner has no knowledge that the premises are being used as a "brothel" by others. Similarly, a person can be convicted of a first-degree misdemeanor for operating or managing a "brothel," without there being an inquiry into whether the person knew that the house or dwelling was a "brothel" or that his or

her activity was unlawful. Ordinance 36-86, therefore, creates a strict liability offense; and, it is important to note that South Euclid made this offense a first-degree misdemeanor, the most serious offense within South Euclid's power to enact, carrying a potential $1,000 fine and a jail term of up to six months. Further, the Ordinance is South Euclid's unique creation, having no counterpart in the Ohio Revised Code or the ordinances of other municipalities.12/

The lack of a scienter requirement clearly exacerbates the Ordinance's imprecision since it has long been recognized "that the constitutionality of

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12/ Although the definition of "brothel" contains the word "purposes," a word generally associated with scienter, the criminal liability provision does not require that a person or association have a purpose to do an illegal act.

a vague statutory standard is closely related to whether that standard incorporates a requirement of mens rea." Colautti v. Franklin, 439 U.S. 379, 395 (1979). See also United States v. United States Gypsum Co., 438 U.S. 422, 434-46 (1978); Smith v. California, 361 U.S. 147 (1959); Screws v. United States, 325 U.S. 91, 101-03 (1945). And, a scienter requirement will not save an otherwise unconstitutionally vague law.

In the instant case, it has already been demonstrated that Ordinance 36-86 is hopelessly vague. Although the inclusion of a scienter requirement would be an ineffective cure for its defects, Screws, 325 U.S. at 103, certainly the lack of a scienter requirement renders it fatally and unconstitutionally vague. Further, since the Ordinance imposes criminal liability upon individuals "without regard to fault," Colautti v.

Franklin, 439 U.S. at 394, thus punishing conduct which is normally considered innocent, the Ordinance's overbreadth is also substantial and real.

2. The Ordinance Regulates Constitutionally Protected Speech.

Ordinance 36-86 makes it a crime for any person to "solicit, invite or entice another to patronize a brothel or to engage in acts of lewdness or sexual conduct." This provision, therefore, creates a first-degree misdemeanor for inviting another person to engage in sexual conduct, clearly reflecting the Ordinance's serious overbreadth implications.

The prohibition against inviting or enticing another to engage in sexual conduct prohibits, by definition, an invitation to engage in vaginal intercourse or oral sex. See South Euclid

Codified Ordinances § 533.01(a) (definition of "sexual conduct"); Respondents' App. at A2. Thus, when applied to consenting adults and particularly to married couples such as Respondents, this provision apparently makes it a crime for a person to ask someone else to engage in intercourse.

In this regard, it is significant to recognize that Ordinance 36-86 does not require a proposal to exchange money for sex as does the traditional crime of "solicitation," which in South Euclid is a third-degree misdemeanor. See South Euclid Codified Ordinances § 533.09.[13] Yet, under Ordinance 36-86,

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[13] Section 533.09 prohibits a person from soliciting another "to engage ... in sexual activity for hire." Respondents' App. at A4. Since "sexual activity" incorporates both "sexual conduct" and "sexual contact," See South Euclid Codified Ordinances § 533.01(c); Respondents' App. at A2, the only significant
(Footnote continued)

an invitation between consenting adults in which no money will exchange hands heightens the crime from a third-degree misdemeanor to a first-degree misdemeanor. Nor does Ordinance 36-86 require that the invitee be offended by the invitation or that the invitor be aware of the offensive nature of his or her invitation. Therefore, this provision is in stark contrast to statutes which punish for inviting another to engage in sexual activity knowing such invitation is offensive to the invitee. See, e.g., Ohio Rev. Code § 2907.07(B) (imposing criminal liability for soliciting "a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is

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difference between solicitation and Ordinance 36-86 is solicitation's requirement of "for hire," which logically would dictate a harsher penalty, rather than a lesser penalty.

offensive to the other person, or is reckless in that regard") (emphasis added); Respondents' App. at A1.

In the instant case, a mere invitation to engage in sexual conduct is adequate to trigger criminal liability regardless of the inoffensive nature of the invitation or the relationship between the parties. This provision, therefore, clearly regulates constitutionally protected speech since such an invitation does not fall within any category of unprotected speech. See, e.g., Beauharnais v. Illinois, 343 U.S. 250 (1952) (libel); Time, Inc. v. Hill, 385 U.S. 374 (1967) (calculated falsehoods); Miller v. California, 413 U.S. 15 (1973) (obscenity); Chaplinsky v. New Hampshire, 315 U.S. 568 (1942) ("fighting" words).

That the overbreadth implications of this aspect of the Ordinance are

both "real" and "substantial" is evident from the Ordinance's significant departure from the commonly understood meaning of the word "brothel" and from other solicitation offenses. If the Ordinance was not intended to reach the speech and conduct described above, it is impossible, as the Supreme Court of Ohio recognized, to discern what this Ordinance does regulate. See Opinion of Supreme Court of Ohio; Petition App. at A11. See also, Zwickler v. Koota, 389 U.S. at 250; Coates v. City of Cincinnati, 402 U.S. at 614.

CONCLUSION

Upon the foregoing, clearly all three state courts had ample reason to strike down Ordinance 36-86 on the grounds of vagueness and overbreadth. Accordingly, no important issues are presented by this case and the Petition should be denied.

Respectfully submitted,

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APPENDIX

OHIO REVISED CODE

§ 2907.01 Definitions.

(A) "Sexual conduct" means vaginal intercourse between a male and female, anal intercourse, fellatio, and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

§ 2907.07 Importuning.

(B) No person shall solicit a person of the same sex to engage in sexual activity with the offender, when the offender knows such solicitation is offensive to the other person, or is reckless in that regard.

SOUTH EUCLID
CODIFIED ORDINANCES

533.01 DEFINITIONS.

As used in this chapter:

(a) "Sexual conduct" means vaginal intercourse between a male and female, and anal intercourse, fellatio and cunnilingus between persons regardless of sex. Penetration, however slight, is sufficient to complete vaginal or anal intercourse.

(b) "Sexual contact" means any touching of an erogenous zone of another, including without limitation the thigh, genitals, buttock, pubic region, or, if such person is a female, a breast, for the purpose of sexually arousing or gratifying either person.

(c) "Sexual activity" means sexual conduct or sexual contact, or both.

533.08 PROCURING.[*]

(a) No person, knowingly and for gain, shall do either of the following:

(1) Entice or solicit another to patronize a prostitute or brothel;

(2) Procure a prostitute for another to patronize, or take or direct another at his or her request to any place for the purpose of patronizing a prostitute.

(b) No person, having authority or responsibility over the use of premises, shall knowingly permit such premises to be used for the purpose of engaging in sexual activity for hire.

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[*] This is the version of § 533.08 prior to the enactment of Ordinance No. 36-86.

533.09 SOLICITING.

(a) No person shall solicit another to engage with such other person in sexual activity for hire.